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# THE HINDU LAW OF ADOPTION

BY

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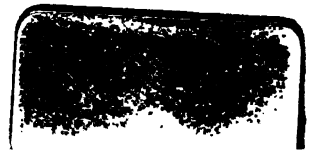

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# THE LAW OF ADOPTION.

## LECTURE I.

## ORIGIN OF ADOPTION AND STATUS OF SONS AND WIVES IN ANCIENT LAW.

**Origin of adoption traceable to principle of slavery—Vasishtha's text—*Patria potestas*—Sale of children for slaves—Slavery in Hindu law—Manu—Nárada—Story of Sunahsepha—Invalid adoption and slavery—Colebrooke—Abolition of slavery in India—Its effects on adoption—Marriage in early law—Forms of marriage—Ásura—Ársha—Daiva—Rákshasa—Bráhma and Prájápatya—Gándharva—Paisácha—Marriage meant transfer of dominion—Its character—Wives joint property—Seventeen descriptions of sons—1. *Aurasa* or real legitimate son—2. *Kshetraja* or appointed wife's son—Condition of appointment—Who could appoint—Men to be appointed—Meaning of *Niyoga*—Its origin—Looseness of marriage union—in Sparta—in Athens—in Rome—Wives heritable property—Modification of this practice—*Niyoga* of a widow—Levirate—Remarriage of widows—3. *Paunarbhava* or son of a twice-married woman—4. *Gúdhaja* or secretly born son of an adulterous wife—5. *Sahodhaja* or son of the pregnant bride—6. *Kánína* or an unmarried damsel's son—7. *Putriká-putra* or son of an appointed daughter—These are sons by operation of law—8. *Kríta* or purchased son—9. *Dattaka* or given son—10. *Svayandatta* or self-given son—11. *Kritrima* or the son made—12. *Apabiddha* or the deserted son—These five are sons by adoption—Other descriptions of sons—13. *Putriká* or the appointed daughter—14. *Vijaja* or natural son—15. *Yatrakvachotpádita* or son begotten on any woman—16. *Dvyámushyáyana* or son of two fathers—17. *Saudra* or son of a twice-born by a Sudra wife—Sonship involved idea of dominion—Procreation by father no element of its conception—No limit to the number of a man's subsidiary sons—Natural relationship no bar to adoption—No restriction as to the age of the adopted—Motive for adoption not religious—Explanation of its origin—Condition of women—Want of physical strength and exclusion from inheritance—Mother's power to give in adoption—Relative position of mother and son—Joint family system—Religious principle in its favour—*Prajá* and the change in its meaning—Rank of a son depended on father's will—Father's power of punishment—Father's right to son's acquisition—No action between father and son—Sons incompetent to perform religious ceremonies—Sons became *sui juris* on father's death—Sons personally liable for deceased father's debts—Liability of one marrying a widow for her deceased husband's debts.**

The usage of Adoption is the survival of an archaic institution which owed its origin to the principle of slavery, whereby a man might, like the lower animals, be the subject of dominion or proprietory right; might, in fact, be bought and sold, given and accepted, or relinquished in the same way as a cow

or a horse. To the primitive mind, conceiving no distinction between man and the lower animals, it would most readily suggest itself that the relationship of parent and child was the most natural mode of acquiring dominion by one man over another. Helpless in infancy human beings are necessarily subject to the care of their parents for a long period, during which the absolute dependence of children on parents and the boundless authority of parents over children become naturally established; and the primitive mind could not conceive any reason why that state of things should cease to exist at any subsequent stage. It would on the contrary appear to be only consistent with its sense of natural justice that the person to whom one owed his birth, and on whose favour the continuance of his existence depended, should ever exercise a right of absolute control over him, extending even to the power of taking away his life.

A text of Vasishtha,[1] which is said to afford the foundation for the Hindu law of adoption, explains the reason of the parents' power over children in these words:—"A son produced from the virile seed and the uterine blood is an effect, whereof the mother and the father are the cause: the mother and the father therefore are competent to give or sell or abandon him." The Rishi who flourished in an age when Hindu society appears to have made considerable progress in civilization, gave the above exposition in relation to the parents' power to give a son in adoption. The principle enunciated, however, would indicate unlimited power in both parents, and although the natural reason assigned applies equally, if not with greater force, to the mother, her rights in this respect are limited by a different principle of early law.

The *patria potestas* of the Roman law in its earlier stage gives us a true conception of the father's power over children in primitive times. The father exercised complete dominion over his children in the same manner as over his slaves, and if there was any difference in his treatment of the two, it was due to natural feelings and not to any legal restraint. The father could sell or expose his children or even put them to death.

*Patria potestas*, literally meaning a father's power over his children, is used by the Roman lawyers to convey the authority possessed by the 'father of a family' over all the members comprised in it; namely, his wife, descendants and others.

The practice of selling children for slaves appears to have obtained amongst ancient societies, though the majority of the slaves consisted of captives taken in war or criminals condemned to slavery. A father had the power of sale, though its exercise might be controlled by natural feelings. European travel-

[1] XV, 1—2, cited in Dattaka Mímánsa, V, 31; See also Baudháyana Parisishta, VII, 2—3, (cited in *Ibid*, 42),—Sacred Books of the East, vol. XIV, p. 334.

lers assure us that there are even at the present day people who feel no compunction in selling their children for slaves, at about the same price that one would take for selling his dogs; some barter a child for a bottle of brandy or for a trinket.[1] If such practices as these existed amongst the ancestors of the civilized nations, one might be led to doubt the stability of human nature, and to think that the tie of natural affection which binds the nearest relations in loving union must be the effect of ages of civilizing influences; and the sacredness of the family relationship, according to modern conception must have been evolved by some inconceivable process out of something utterly inconsistent with it.

But it should be borne in mind that in judging of the usages and institutions of ancient societies, we must guard ourselves against falling into the common error of supposing that the circumstances under which they lived were at all similar to those that we are surrounded by. Human society has passed through various successive stages, and an institution, absolutely necessary in its earlier unsettled and anarchical stage, may well seem to be unnatural at a subsequent stage, when the reason of its existence has disappeared. It should moreover be observed that in studying ancient society, we should not commit the mistake of thinking that the words father and son conveyed in ancient times the same ideas that are familiar to us. The exigencies again of the mode of life led by savages living perhaps on the precarious food procured by hunting or similar uncertain methods would at times make it more beneficial for a child to be sold to a person capable of maintaining him than to live with his parents and starve. Distress and poverty of the parents would alone be found to be the cause of what at the first sight might seem to be most unnatural and revolting. The practice of selling or parting with a child for purely selfish motives is one which could not but be exceptional even amongst the rudest tribes. The very springs of human action to which the existence of slavery must be ascribed, would be opposed to the universality of such a practice. And although much that we call natural may be due to acquired habits of thought, yet, the better part of human nature appears to possess a real stability and the seeming aberrations are attributable to adventitious circumstances.

Slavery is fully recognized in Hindu Law; and the various modes by which a person became a slave are enumerated in the Smritis. Manu[2] describes seven causes of slavery, namely, capture in war, voluntary submission to slavery in consideration of maintenance, birth from a female slave, sale, gift, inheritance from ancestors, and condemnation to slavery by way of punishment. Nárada[3] deals with the subject in detail and enumerates fifteen descriptions of

[1] K. Bhattáchárya's Tagore Lectures, p. 17.

[2] VII, 415.

[3] Narada Smriti (Asiatic Society's Edition) Fifth Topic, verses 26—28.

slaves :—one born of a female slave in the house of her master, one bought, one received by gift, one inherited from ancestors, one maintained in famine, one pledged by the owner, one relieved from a great debt, one made captive in war, one won in a stake, one giving himself as a slave in this form 'I am thine,' an apostate from religious mendicity, one becoming a slave for a stipulated time, one becoming a slave for maintenance, one becoming a slave of the master for the sake of his female slave, and one self-sold. Regard being had to the interpretation put by some commentators upon these texts, a doubt might arise as to whether these passages treat of the ways in which a free man was reduced to the condition of a slave, or of the modes in which a person became owner of a slave. But it was quite unnecessary to deal with the latter subject, since when once a man was reduced to slavery, he became what is contemptuously designated a biped,[1] as being hardly distinguishable from a quadruped, and therefore might like chattel pass from one owner to another, by sale, gift, or pledge, the ordinary modes of transfer of property. The discussion becomes important for the purpose of considering what should be understood by the terms "sold" and "given," employed by Manu and Nárada to designate two descriptions of slaves. If the sages be taken to treat of the modes by which a free person became reduced to slavery, then sale and gift mentioned by them must be admitted to be made by a person possessing the *patria potestas* or dominion over the man who is the subject of the sale or gift. But some of the commentators have explained these words to relate to a slave passing from one master to another by sale or gift. This, however, does not appear to be the natural meaning of the texts if they purport to describe the modes of slavery. The only objection that might be taken to the construction of the passages in that way, is, that inheritance from ancestors enumerated as one of the modes cannot be regarded as a cause of slavery. But it should be borne in mind that the enumeration of inheritance as a cause of slavery may be necessary for the purpose of indicating that the death of the master has not the effect of emancipating a slave, although other persons holding a position similar to that of a slave, in relation to the master, became *sui juris* or independent on his death.

The sale of a son for a slave is but an incident of the unlimited power possessed by a father over the person and property of his child in ancient society. In the earliest times a Roman father could sell his children as slaves, and there was an express provision to that effect in the law of the Twelve Tables. The records of Hindu usages and customs afford ample evidence that a Hindu father's power over his children was exactly similar to that recognised by the ancient Roman law. The story of Sunahsepha Devaráta,[2] which we find in the

[1] Dáyabhága, Ch. II, 29.

[2] Max-Müller's History of Ancient Sanskrit Literature, p. 408 *et sequel*.

Aitareya Bráhmana and in the Sánkhyáyana Sútras furnishes us with an instance of a Bráhmana father selling his second son with the knowledge that the boy was intended as a sacrifice to appease the god Varuna. And it is reasonable to suppose that the sale, gift *et cetera* set forth by the sages as causes of slavery refer to a sale or a gift by the father having dominion over his children; a gift, however, of a child for such a purpose might take place only in a season of extreme distress. Passages are found in the Smritis, declaring the sale and gift of children to be sinful; and these afford indirect evidence of the prevalence of the practice amongst Hindus in ancient times. Thus the sale of a child is pronounced by Manu[1] and Yajnavalkya[2] to be a sin in the third degree; and the gift of a child is also prohibited by Yájnavalkya.[3] There is not, however, any indication found in either of the Codes, that a sale or gift of a child, if made is invalid; although the seller or giver might be guilty of a sin of a lighter degree. Nor would it be reasonable to maintain that the sages intended to prohibit the sale or gift of a child for adoption, for the affiliation of sons received by purchase or gift is recognised by both the sages, and it is rather declared to be a meritorious act on the part of a father to give away a son in adoption.[4] The prohibition, therefore appears to be directed against the sale or gift of a child for the purpose of being treated as a slave by the donee or buyer.

In ancient society the condition of a son in so far as regarded his position relatively to his father was hardly distinguishable from that of a slave: a father could exercise the same rights over his sons as a master did over his slaves. The prominent idea involved in an adoption was the transfer of dominion or *patria potestas* so far as regarded the action of the natural father in the matter. Adoption or the investment of the boy with the status of sonship depended entirely upon the will of the adopter. In the Dattaka form of adoption the gift by the father and the acceptance by the adopter indicate no more than the transfer of dominion from the giver to the taker. The subject of the gift and acceptance is not thereby constituted a son of the acceptor. His intention to make the boy his son must be manifested by additional formalities. And this must necessarily be the rule amongst a people recognizing slavery and a father's power to reduce his child to that abject condition by sale or gift. It is upon this ground that the Hindu commentators insist upon the observance of religious ceremonies in addition to gift and acceptance for the completion of an adoption, so that the intention may be clearly made known that the boy is not taken for a slave. They go so far as to declare an actual adoption invalid where there has been an omission of the prescribed religious ceremonies. And a boy who has been given

[1] XI, 62 and 67.
[2] III, 236.
[3] II, 175.
[4] Saunaka cited in Dattaka Mimansa, IV, 1.

and taken, but whose adoption fails on this ground or on the ground of its being in contravention of other rules relating to the subject is pronounced by Bálambhatta, Nanda Pandita[1] and Jagannátha[2] to become a slave of the adopter.

Colebrooke, whose opinion in matters connected with Hindu law and usage is entitled to great respect, hesitates, however, to accept the correctness of Jagannátha's view, upon the ground that it is unsupported by any authority except a passage of the *Káliká-purána* the authenticity of which is called into question by some of the Hindu commentators themselves.[3] But the interpretation which Jagannátha puts forward appears to be perfectly consistent with the ancient doctrine of *patria potestas* and the modes of slavery. The tenacity of customary law in Hindu society is well known, and the primeval rules relating to a father's power and the origin of slavery did theoretically continue in force till very recent times. But it should at the same time be observed that the idea of slavery is so shocking to the human mind, that it could not continue in its pristine vigour for a long time in any civilized society, at least in so far as the members of that particular society are affected thereby. The severity therefore of slavery and the father's power was practically, softened down by various causes, chief of which was the influence of Religion which was the civilizing force in India. It is remarkable that even the Mitákshará which is so favourable to sons' rights as against their father, admits a father's absolute dominion over his sons.[4] At first sight it might appear to be inconsistent and irreconcileable that a son who is absolutely dependent upon his father should possess a co-ordinate right to ancestral property with him who has the power of depriving the son of his status and reducing him to the condition of a slave. But the theoretical power, which, owing to natural love and affection, to religious influence, and to the social check, was seldom if ever exercised might practically be taken to be non-existent. It is therefore quite natural that Colebrooke well informed about the actual state of Hindu society at his time, should entertain a doubt about the legal consequence of an invalid adoption upon the status of the boy who is the subject of gift and acceptance; while Bálambhatta, Nanda Pandita and Jagannátha learned Hindu lawyers perfectly familiar with the principles of Hindu law and usages should, independently of each other, come to the same conclusion as set forth above.

Although the Rishis had by the introduction of the caste system and by means of restrictions based upon religious grounds succeeded in putting a check to the further growth of slavery, and in improving the condition of the slave, by imposing rules as to the mode of their punishment, yet the usage continued in force till it was abolished by the British Government. The people of En-

[1] Dattaka Mímánsá, IV, 22, 39 and 40.
[2] Colebrooke's Digest, Vol. II, p. 14, Madras Edition.
[3] Strange's Hindu Law, Vol. II, p. 2:
[4] Bombay Edition, p. 225; original.

land feel a sort of instinctive abhorence for this inhuman institution, which was therefore not likely to subsist long in British India. Practical wisdom however, for which the English people are remarkable, dictated the gradual abolition of an ancient usage, although refined feelings might call for its immediate suppression. Accordingly they commenced by enacting Regulation X of 1811 which prohibited the importation of slaves from foreign countries into the British territories. The great importance of this rule lies in the fact that the safeguard of sympathy felt towards each other by the members of a society bound together by ties of a common language, common religion and a local union which may offer some protection to a member against ill-treatment, is utterly wanting in the case of a foreigner. This rule was by Regulation III of 1832 extended to those provinces that had subsequently come into the possession of the British Government. Later on was passed Act V of 1843 prohibiting all officers of Government from recognizing slavery as an institution in any matter coming before them in their official capacity. And it was finally abolished in 1860 by the Indian Penal Code which declared the equality of all men, without any distinction of colour, creed or caste, and provided punishment for buying or selling any person as a slave.[1]

The object I have in view in drawing your attention to the laws abolishing slavery is to impress on your mind the fact that in studying the law of adoption you must bear in mind that the Sanskrit commentators dealing with the subject of affiliation flourished in an age when slavery was in full force in India. An adoption being essentially a transfer of dominion bears a close resemblance to slavery; and it is worthy of remark that Manu employs the term *krita* or bought, to designate both a slave and a son purchased, and the term *dattrima* or given in the sense of a slave and a son received by gift.[2] The fact again that the condition of a slave is the lot of a boy whose adoption proves invalid, has an important bearing on several questions relating to adoption especially on the nature and character of the rules introduced by the latest commentators respecting the qualifications of the boy to be adpoted. The abolition of slavery, on the other hand, cannot fail to be attended with important legal consequences bearing upon the law of adoption, which has in fact assumed an entirely novel aspect. The conception of paternity and sonship has been materially changed by cutting down the father's power in an important point. Dominion can no longer be acquired by one man over another, and the failure of an adoption therefore cannot deprive the boy of his status and birthright. The religious ceremonies prescribed for adoption, also, lose their importance, as gift and acceptance of a son can now take place only for the purpose of an adoption.

The conception of sonship is intimately connected with the idea of marriage

[1] Section 370.

[2] Manu (original) VIII, 415; IX, 168 and 174.

or the relation subsisting between father and mother, and hence in order to fully realize that conception it is necessary to take into consideration the nature and character of marriage in ancient society. The prominent idea involved in marriage according to primitive notions appears to be the acquisition of dominion or ownership by a man over a woman not belonging to the same *gotra* or tribe with himself. For the rule of exogamy prohibiting a marriage between two persons of the same *gotra* or tribe obtained from the earliest times in Hindu society and is observed to the present day. The different modes in which the marriage of a woman could take place were the same as those in which a man might become reduced to slavery or any property might be acquired. A father had the dominion over a female child in the same way as over a son, and a marriage of a female child, whatever might be its form, must partake of the nature of a transfer of that dominion from the father to the husband. The primitive conception of a husband is disclosed by the term *svámin* (or husband) which by derivation means an owner and is now employed in that sense also. That marriage implied a transfer of dominion is intimated by Manu[1] in these words :—"The recitation of the holy texts, and the sacrifice in honour of Prajápati or lord of creatures are used in marriages for the sake of procuring good fortune to brides; but the gift (by the father) is the primary cause of the husband's dominion."

The different forms of marriage described in the *Smritis*, throw considerable light on the subject and show that marriage originally meant a transfer of ownership in a woman. The Asura form of marriage is in fact the sale of a damsel to a man in consideration of a price paid, and appears to have been most prevalent in early society. Vasishtha[2] calls this form of marriage by the name of *mánusha* literally signifying, 'appertaining or common to man,' and he cites a text of the Vedas indicating the practice of purchasing a woman for wife. Passages[3] in the Codes condemning this form of marriage and characterizing it to be no better than a sale of the bride, whereby she becomes a slave of the man taking her, afford indirect evidence of the prevalence of the sale of daughters for marriage at that time. The practice is still in force amongst several castes of Hindus ;[4] and amongst several frontier tribes it is found in its primeval simplicity: "The Mishmis in Assam are extensive polygamists ; each man may have as many wives as he can afford to purchase, the price ranging from a pig to as high as twenty oxen."[5] The form of marriage called *Co-emptio* in Roman law which was a fictitious sale by the father of the bride to the bride-

[1] V, 152.

[2] I, 35,—Sacred Books of the East, Vol. XIV, p. 6.

[3] Manu, III, 51 and 53 ; Baudháyana,—Sacred Books of the East, Vol. XIV, p. 207-8.

[4] Dr. Banerji's Tagore Lectures, pp. 83-86.

[5] Hunter's Statistical Accounts, Vol. I, p. 325.

groom, appears to have been a traditional relic of the Ásura form or a real sale in still earlier times. Nor does this form appear to have been confined to maidens only, for in a state of society in which a man could sell his wife, this form very likely extended to a married woman who became the wife of the person to whom she had been sold by her husband.

The Ársha form bears a close resemblance to the present practice of the Mishmis, as in this form a daughter was sold for a price consisting of a bull and a cow, the only difference appears to be that the price was a fixed one.

In the Daiva form also there was a valuable consideration received by the father of the bride as she was given to a priest entitled to remuneration for officiating at a *vedik* sacrifice in lieu of his fees.

The Rákshasa form consisted in the forcible capture and abduction of a woman from her relations; it resembles the right of a victor to the person of his captive in war. In the Code of Vasishtha this form of marriage is named *Kshátra* or appertaining to the Kshatriyas or the warlike caste; while it is called *Rákshasa* by other sages who, however, declare that it is lawful for the warrior caste alone, in the same way as conquest as a mode of acquiring ownership in property is recognised to be peculiar to that caste.[1] The existing usage of marriage processions attended with pomp and military music may very probably be a relic of the ancient warlike movement for the capture of a wife. It should be observed that marriage by capture was not necessarily confined to unmarried damsels, but must have from the nature of its character, been extended to married women as well. The well known story of the forcible abduction of Sítá, the wife of prince Ráma, by Rávana, the king of Ceylon who offered to make her his principal queen, illustrates what marriage by capture did really mean.

The Bráhma and the Prájápatya[2] forms, in which the disinterestedness of the bride's father is the distinctive feature appear to be of later growth and became prevalent as society advanced in civilization and polished manners. In these two forms there was a real gift by a father of his daughter in marriage, from the pure motive of making her happy, and instead of receiving any consideration from the bridegroom, the father has to bedeck his daughter with valuable ornaments when making a gift of her at the connubial ceremony. There is no substantial difference between the two as forms of marriage, and it is probably for that reason that Ápastamba and Vasishtha have not enumerated the Prájápatya as a separate form. The requirements of the Bráhma form are, that the bridegroom should be learned in the Vedas and a bachelor of good

[1] Gautama X, 39-42,—Sacred Books of the East, Vol. II, p. 228; see Mitákshará, Ch. I, I, 8.

[2] Manu, III, 27 and 30.

character, and that the father of the bride should find out such a person and offer to give him his daughter in marriage. This form appears to have been intended as a reward for learning in the scriptures and conceived as an encouragement of the study of the Vedas. The name Bráhma does not indicate that it appertained to the Bráhmanas or the sacerdotal class only, but it obviously means relating to Brahma or Vedas, and implies that this form of marriage was intimately connected with the study of the Vedic literature, which might be prosecuted by Kshatriyas and Vaisyas, members of the other two regenerate classes, as well. In the Prájápatya form the bride is given to a person with an agreement that the donee is to treat her as a partner for secular and religious purposes; and the proposal comes from the bridegroom who is a suitor for the damsel. The existence of the condition restricting the husband's freedom of action was perhaps the reason why this form is considered to be inferior to Ársha and Daiva. The unconditional transfer of dominion was perhaps as in Roman law regarded the best form of marriage.

The Gándharva form is based upon mutual love of a man and a woman, and the marriage appears to have been preceded by consummation at least in some cases, resembling the form of marriage called *Usus* in Roman law. Its origin may be ascribed to the non-existence of a person exercising *patria potestas* over a damsel who was therefore entitled to make a gift of herself to a man.[1] It seems to be anomalous that the Hindu sages who assign to women the condition of perpetual pupilage should recognize a form of marriage based upon a damsel's freedom of action, but its recognition appears to be due to the desire for the preservation of female chastity evinced by the Hindu sages who laid down this form to induce the father to give the damsel in marriage to the seducer.

The Paisácha form is not recognized by Ápastamba and Vasishtha though enumerated by other sages. It is a most abominable form of marriage originating with a sort of rape committed upon a damsel while she is asleep or drunk; and it might appear exceedingly strange that such a reprehensible crime which the sages condemn in the strongest terms and for which condign punishment is provided, should be admitted to cause the relation of husband and wife between the criminal and his victim. The real explanation appears to be that when chastity and single-husbandedness of women came to be valued most, in comparison with which all other considerations sank into insignificance that it was recognised as a form of marriage, the ravisher being compelled to marry the girl defiled. It would be taking a superficial view of Hindu law to regard this as an instance in which fraud is legalized by it.[2] It may be mentioned here that according to the Roman law, the ravisher was not under any circumstances, allowed to marry the dishonoured damsel.

[1] Vishnu, XXIV, 23.

[2] See Macnaughten's Principles of Hindu Law (2nd edit.) p. 60, note.

These different forms of marriage barring the two exceptional ones, were founded upon sale, gift for a consideration, real gift or capture, and establish that marriage in early times involved the idea of acquisition of dominion by a man over a woman. The nuptial ceremonies amongest the Hindus, consisting of the formalities of gift and acceptance were originally understood to effect a real transfer of dominion though they have long since come to be regarded as figurative when with the advance in civilization the institution of marriage assumed a sacred character. The primitive conception of marriage and of the relation of husband and wife, was that the marriage transferred the *patria potestas* from the father to the husband, and the wife was placed absolutely under the dominion and control of the husband. The Roman lawyers expressed it by saying that so far as the exercise by a husband of the *patria potestas* over his wife was concerned, a wife held the position of a daughter of the husband. The condition of a wife was hardly distinguishable from that of a slave, as regards the husband's power over her. A husband had the power of life and death over his wife; the well-known story of Parasurám beheading his mother by command of his father furnishes us with an instance of the extent in early times of a man's power over his wife. A wife again could be sold, given or dealt with in any other way by the husband in the same manner as any other property. Kátyáyana[1] says that a wife should not be given away or sold without her consent; but in extreme necessity he may do so. Passages in the Codes declaring the sale of a wife to be sinful, also prove the existence of the usage of selling a wife.[2]

The primitive conception of marriage consisting in the acquisition of dominion over a woman, and wives being regarded as a sort of possessions, there was no limit to the number of wives a man might have; he could have as many as he might afford to procure by the different modes pointed out above. Under such circumstances mutual fidelity could not form any part of the marital relation: looseness of the marriage tie and laxity in sexual morality must necessarily prevail. Any idea of fidelity, sentiment or delicacy did not exist as an element of marriage union, and a husband appears to have had no great objection to allow his wife to be approached by other men.[3]

In the earliest times when society was composed of joint families and individual rights and responsibilities were unknown, but every institution was moulded by the family union and the tribal connection, there is every reason to believe that a wife was considered the subject of joint right of families and tribes in the same way as any other description of property; although for the

[1] Colebrooke's Digest (Madras Edition), Vol. I, p. 406.

[2] Daksha cited in Colebrooke's Digest, Vol. I, p. 409; (Madras Edition), Yájanavalkya, III, 242; Manu, XI, 62.

[3] Apastamba,—Sacred Books of the East, Vol. II, p. 130; Baudháyana, *Ibid*, Vol XIV, 229

purpose of preservation of peace amongst the members of the same family or tribe a woman brought into the family or tribe in any of the modes of marriage became by common consent the wife of an individual member, was set apart as it were, for the separate use of that particular member.[1] For any property acquired by joint exertion or with the aid of joint funds becomes the subject of joint right, and in the acquisition of a wife there might be the joint exertion of the members of a tribe as in a marriage by capture, or expenditure of joint property as for paying the bride's price in the Asura form. The five Pándavas having a common wife, indicates the existence of an early custom to this effect, which is still found in Tibet.

The description of the divers kinds of sons recognized by the ancient usage prevailing in India, throws considerable light on the primitive conception of marriage union and sonship. There were so many as twelve different sorts of sons, described in the Codes of Hindu sages, while some of them enumerate other kinds raising up the number to seventeen. They are called (1) Aurasa or the real legitimate son, (2) Kshetraja or the appointed wife's son, (3) Paunarbhava or the son of a twice-married woman, (4) Gúdhaja or the secret-born son of an adulterous wife, (5) Sahodhaja or the son of a pregnant bride, (6) Kánína or the unmarried daughter's son, (7) Putriká-putra or the appointed daughter's son, (8) Kríta or the son purchased, (9) Dattaka or the given son, (10) Svayan-Datta or the self-given son, (11) Kritrima or the son made, and (12) Apabiddha or the deserted son. To these some add, (13) Putriká or the appointed daughter, (14) Víjaja or a son begotten on another's wife, (15) Yatrakvachanotpádita or the son begotten on any woman, (16) Dvyámushyáyana or son of two fathers, and (17) Saudra or the son of a twiceborn by a Sudra wife. It must, however, be borne in mind that this classification of sons made at a later stage of society when the caste system had been introduced, and in accordance with principles underlying the law enunciated in the Codes, does not in every particular represent the actual state of things existing at the earliest age or even at the time when the Codes were composed.

The Aurasa or the real legitimate son is what in the present day is ordinarily understood by the term son, namely, a son begotten by a man himself on his own wife. In defining an *aurasa* son, the sages require that the wife should be lawfully wedded with religious rites, and that she should be one that was not married to another husband before and was a virgin at the time of marriage. These conditions appear to be later innovations; the religious ceremony was not an essential element, though regarded to be auspicious[2] at firs it has now become indispensable; while the second condition has been introduc

[1] Apastamba,—Sacred Books of the East, Vol. II, p. 164; Manu, IX, 97.

[2] Manu, V, 152.

to distinguish an *Aurasa* son from the Paunarbhava or the son of a twice-married woman, who is classed with the subsidiary or secondary sons. But the opinion of the sages who inculcated single-husbandedness for women, is not sufficient to establish the existence in primitive times of any distinction between these two descriptions of sons.

The Kshetraja or the appointed wife's son is a son that belongs to his mother's husband though not procreated by him. He is described by Manu,[1] thus, he who was begotten on the duly appointed wife of a man deceased, or impotent, or disordered is called the Kshetraja or wife's son. But there might be an agreement with the person appointed to procreate a son on another man's wife, that the son begotten shall belong to both the progenitor and the wife's husband. The reason of the rule is thus explained by Manu :—"Those that are familiar with past times, have preserved, on this subject, a sacred traditional maxim of Váyu, namely, 'A man must not sow his seed in the wife of another man.' As with cows, mares, female camels, slave girls, milch buffaloes, she-goats and ewes, it is not the owner of the (bull or other) father who owns the offspring, even thus is it with the wives of others. They who have no property in the field, but having seed in their possession sow it in the field owned by another, can derive no benefit whatever from the corn that may be produced. Should a bull beget a hundred calves on cows not owned by its master, those calves belong solely to the owner of the cows. Thus men sowing their seed in other men's wives in whom they have no dominion, may raise up offspring to the husbands; but the progenitor can have no advantage from it. Unless there be a special agreement between the owners of the seed and of the soil or wife, the fruit belongs clearly to the owner of the soil or wife; for the receptacle is more important than the seed: but the owner of the seed and of the soil or wife may be considered in this world as joint owners of the child or fruit when by special contract in consideration of the seed the soil is given."[2] It should be observed that if a person could give his wife to another, with a contract that the child produced should belong to both, there could also be an agreement that the child should appertain to the progenitor exclusively. A man might therefore lend his wife to a person so that he might have some children by her.

The appointment of a woman to raise issue by a man other than her husband, used to take place if the connection of a woman with her husband proved barren or fruitless. The husband's being destitute of male issue does not appear to have been a condition of such appointment though it is so affirmed by some commentators. On this point Manu[3] says that on failure of issue by the husband, the desired offspring may be procreated, either by the brother-in-law or some

[1] IX, 167.
[2] Manu, IX, 42, 48-53.
[3] IX, 59.

other Sapinda, on the wife who has been duly appointed. The woman appears to have been merely a passive agent, whose wishes were at first seldom, if ever, consulted, though later on the appointment of a woman unwilling to accept it, appears to have been prohibited; so also of a woman who had borne sons or was past child-bearing.

The decision of the question whether there should be an appointment or not rested with the *Gurus* or the venerable protectors, that is to say, the elders of the family or tribe, such as the father-in-law. This must have been necessarily the case when a widow was appointed, and it is more probable than otherwise, that an appointment during the husband's lifetime could take place by the sanction of the husband's father, for if he was alive the husband could not be independent. In primitive times a son could have a wife by the father's choice and a son with his family was absolutely under the control of the father. When, however, the husband was independent, he was the person who alone could command his wife to have issue by another man.

The persons who might be appointed to raise issue on a woman were her husband's brother, a Sapinda, a Sogotra or a Samánapravara. Baudháyana[1] declares that a widow might under appointment bear a son to her brother-in-law. Gautama[2] declares that the brother-in-law was the person to be appointed and on his failure a Sapinda or a Sogotra or a Samánapravara might be appointed; but he adds that it is the opinion of some authority that none but a brother-in-law could be appointed and he declares in another place that a son begotten on a widow whose husband's brother lives, by another relative, is excluded from inheritance.[3] Manu propounds that the brother-in-law or a Sapinda might be appointed.[4] The appointment of a stranger does not appear to have been favoured at first. Gautama[5] declares that an offspring begotten by a stranger belongs to the procreator, and then adds that he may belong to both the woman's husband and the procreator, thereby intimating that he does not belong exclusively to the husband.[5] But Yájnavalkya[6] ordains that the Kshetraja son may be begotten by a *Sogotra* or any other person, while Vishnu[7] says that the person to raise issue must be a Sapinda or a man belonging to a superior tribe. This must have been a later innovation when caste system was established and the Bráhmanas reserved for themselves the privilege of raising issue on the wives of other castes. A text is cited in the Dattaka Mimánsa,[8] showing that a Bráhmana could be appointed to raise issue on the wife of a man on payment to him of a price for his seed. Vasishtha ordains that a sickly man must not be appointed to raise issue.[9]

Strictly speaking the appointment to raise issue, so far as the man to be ap-

[1] Baudháyana,—Sacred Books of the East, Vol. XIV, p. 234. [2] XVIII, 6. [3] XXVIII, 23.
[4] IX, 59. [5] XVIII, 12 and 13. [6] II, 118. [7] XV, 3. [8] V, 16. [9] XVII, 60.

pointed was concerned, was confined to the members of the same family or tribe who had the privilege and the duty of procreating a son on the wife of a man belonging to the same family or tribe. They could not claim any remuneration for the service rendered by them and were bound to comply with the direction of the elders. The word *niyoga* rendered into 'appointment to raise issue,' literally means an order, command or direction. In the case of a stranger, it was the price offered for his seed, and not the appointment by the elders whom he was not bound to obey, that induced him to act in the matter.

The usage of appointment of the husband's kinsmen to raise issue on a woman appears to have originated in the peculiar view of marriage union in primitive times. Women were considered a sort of property, and marriage consisted in the transfer of proprietory right from the bride's father to the husband. But as property was held in common by the members of a family or tribe, and as the consideration for the bride would be the subject of common right, the bride though formally given to the bridegroom would theoretically belong to the family or tribe of which he was a member. A wife like many other descriptions of property, might be appropriated to the separate use of an individual member, though the subject of a common right of the family or tribe. The well-known story of the five Pándavas having one wife in common, and at the same time some of them having other wives separately is an instance in point. Accordingly Ápastamba[1] in laying down the rule that a husband must not make over his wife to any other than his kinsman for the purpose of raising issue refers to a tradition that a bride is given to the family of her husband and not to the husband alone. The very existence of a tribe and its honour depended on the number of its members and the tie of family or tribal union in the earliest times was the strongest bond that ever bound human beings together, hence there should naturally be a desire for the increase of its members, and if there was a failure of issue by the husband on a woman, any other member of the tribe might procreate a son on her, so that the desired offspring might be had without corruption of the tribal blood. A son to a certain extent would appear to have been deemed *filius populi* of the tribe to which he belonged.

The practice of lending and borrowing wives for the purpose of procreation was not confined to India; but was common in other countries also, in earlier times. Plutarch gives an account of the existence of this practice among the Spartans:—"Lycurgus, the Spartan lawgiver, thought the best expedient against jealousy, was to allow men the freedom of imparting the use of their wives to whom they should think fit, so that they might have children by them; and this he made a very commendable act of liberality, laughing at those who thought the violation of their bed such an intolerable affront, as to revenge it by murders and cruel

[1] Sacred Books of the East, Vol. II, p. 164.

wars. He had a good opinion of the man, who having grown old and having a young wife, should recommend some virtuous and agreeable young man, that she might have a child by him to inherit the good qualities of such a father, and should love this child as tenderly as if begotten by himself. On the other side, an honourable man who had love for a married woman, on account of her modesty and the well-favouredness of her children, might with good grace beg of her husband his wife's conversation that he might have a scion of so good a tree to transplant into his garden: for Lycurgus was persuaded that children were not so much the property of their parents as of the whole commonwealth, and therefore would not have them begotten by the first comers but by the best men that could be found." One of the principal punishments at Sparta, says Montesquieu "was to deprive a person of the power of lending his wife, or of receiving the wife of another man." Socrates is said to have favoured his friend and pupil Alcibiades with the society for a limited period of Xantippe. And the law of Athens permitted women to apply to her husband's relations in case of his impotence. Amongst the Romans also the practice obtained of lending wives that had borne three or four children to their husbands, to young men for the purpose of bearing the desired number of offspring to the borrower. Plutarch in his life of Cato tells us that Cato perceiving that his friend Quintus Hortensius felt an earnest inclination for his wife Martia, consented to part with his marital dominion in favour of his friend who received her in marriage, being given by her father Philip.

The usage of appointment throws considerable light on the condition of wives in early times who were treated in the same way as cattle, and regarded as a sort of property belonging to their husbands, and capable of yielding produce in the shape of children. The condition of the widows on the death of their husbands must therefore be moulded upon the principle of their having been the property of their deceased husbands; and they would pass to the heirs of their husbands like other property belonging to them. This usage of wives of a deceased person passing to his heir with a natural modification, is found to exist amongst the Mishmis, an extensively polygamous tribe living in the hills at Lakhimpur in Assam. On the death of the husband all of his wives who survived him became the property of his heir with the exception of the mother, should she be amongst them, who would go to the next of kin amongst the males. This custom obtains also among some other tribes in that country.[1] The exception in relation to the mother would gradually come to be extended to all the wives of the father. Domestic peace and happiness of a joint family would require that all the father's wives should be looked upon as mothers, and son's wives as daughters. Accordingly we find the sages declar-

[1] Hunter's Statistical Accounts, Vol. I, p. 325.

ing that all the father's wives are similar to the mother, and that the violation of the bed of the father, or of a son, is one of the worst crimes that may be perpetrated by man.[1] The records of Hindu usages, however, do not furnish any instance amongst Hindus of the usage now prevailing among the hill tribes of Assam.

The natural development of the usage, therefore, would be that the widows of a deceased person, should pass to his brother, in the same way as other property belonging to a man passes by survivorship to his brother in default of male issue, who though existing are incapable of inheriting this particular description of property. We find that the usage in this form prevails in many rude societies[2] and obtained amongst Hindus in early times. The second verse of the fortieth hymn in the tenth Mandala of the Rig-Veda refers to the usage of a widow applying to her *devara* or deceased husband's brother. The word *devara* which by derivation may mean the second *vara* or husband, or a playmate, is generally used in later Sanskrit, to designate the husband's younger brother. It may be that the husband's younger brother being a young man and possibly a bachelor was considered the fittest relation to inherit his deceased brother's wife or wives. The widow, however, of a deceased person did, according to this usage occupy the position of a wife of her husband's brother, and a son produced by her belonged to her second husband.

In course of time when the usage of treating women in the same way as cattle came to be looked upon as a barbarous institution, the practice of a deceased person's widows devolving on any relation of his by inheritance would fall off. The widow would continue to live as a member of her husband's family, but not under the control of any male member as his wife, nor perfectly free so as to be independent of her husband's family and to be allowed to remarry of her own accord. The practice of appointing a widow appears to owe its origin to this stage of society, when young childless widows were considered entitled to have the society of their husband's brother or any other relation for the purpose of having issue. A widow had to pass a life of austerity for six months or a year following the death of her husband;[3] and after the expiration of that period she might, with the sanction and appointment of the venerable elders of her deceased husband's family, have the desired offspring by her brother-in-law or other relation.

The usage of levirate, or the procreation of a son by a man on his deceased brother's widow, was the most approved form of *niyoga* or appointment. This usage was not peculiar to the Hindus, but also obtained amongst other nations

[1] Manu XI, 55, 103—105 and 171. [2] Herbert Spencer's Sociology, Vol. I, p. 680.

[3] Baudhâyana,—Sacred Books of the East, Vol. XIV, p. 234; Vasishtha, XVII, 56, *Ibid.*, 90.

such as the Jews. It is ordained in the Bible thus:—"If brethren dwell together, and one of them die and have no child, the wife of the dead shall not marry without unto a stranger, her husband's brother shall go in unto her and take her to him to wife, and perform the duty of an husband's brother unto her. And it shall be that the first born which she beareth shall succeed in the name of his brother which is dead, that his name be not put out of Israel. And if the man like not to take his brother's wife, then let his brother's wife go up to the gate unto the elders and say, my husband's brother refuseth to raise up unto his brother a name in Israel, he will not perform the duty of my husband's brother. Then the elders of his city shall call him and speak unto him."[1]

This passage throws considerable light upon this obsolete usage. It appears to have been the duty of the husband's brother to whom a widow had to apply to comply with her wishes, and an order or appointment from the elders was necessary in case he refused to discharge the duty. The intervention therefore, of the venerable elders was not necessary in every case; the practice was that the widow applied to her husband's brother, and if he acceded to her request there was an end of the matter. And in case of his refusal or default, other kinsmen might be appointed by the venerable elders of the family or tribe.[2]

Remarriage of a widow was inconsistent with a woman's position in relation to her husband and to his family, such as has been already described. It could take place only on the supposition that a woman on the death of her husband became *sui juris* or independent. This therefore was a later development when society was more advanced in civilization, and women ceased to be considered as no better than lower animals and came to be regarded as human beings. The first step naturally would be a transition from levirate to remarriage of the widow with her husband's brother, or other kinsman. This was calculated to reconcile the original theory with advanced ideas, and accordingly we find the practice of remarriage of widows with their brothers-in-law, to be still prevalent in Orissa and other localities. In course of time, however, a second marriage of women was finally recognized under certain contingencies without any restriction as to the particular man to be married.

The son produced by a woman who being abandoned or disowned by her husband, or being a widow, has of her own accord been married to a second husband is called *paunarbhava* or son of a twice-married woman. Other sages have added that a woman might remarry if her first husband is impotent, or is unheard of for a certain time, or has adopted the religious order of mendicancy.[3] The Hindu lawgivers have for reasons already alluded to, enumerate

[1] Deuteronomy xxv, 5—8.

[2] See Book of Ruth.

[3] Baudháyana,—Sacred Books of the East, Vol. XIV, p. 228; Nárada-Smriti, Twelft Topic, 97.

the *paunarbhava* as a son of the subsidiary class although he is a real son of his father.

*Gúdhhaja*, or the secretly born son of the wife, is the issue of the wife's adultery with an unknown person, when the husband was absent from home or had no access to the wife. He belongs to his mother's husband and differs from the appointed wife's son in two respects; firstly, his mother's connection with the natural father was unauthorized; secondly, the man might be a perfect stranger to the family. The later commentators, however, add that although the particular individual might not be known, yet it is necessary that it should be certain that the procreator belonged to the same caste with the husband, in order that the son might be recognized as the Gúdhhaja son of the husband. It should be observed that neither sentiment nor delicacy stood in the way of the husband's claiming the adulterous wife's son as his own. The wife was his property and an accession to it must legally belong to him.

*Sahodhhaja* or the son of the pregnant bride is the son brought forth by a woman who was with child at the time of her marriage. The child belongs to her mother's husband, though not procreated by him. The woman with the embryo in her womb formed the subject of transfer by sale or gift according to the form of marriage, and therefore passed to the husband, who becomes the father or owner of the child born subsequently to marriage, on the principle of *partus sequitur ventrem*.

*Kánína* or an unmarried daughter's son is thus described by Baudháyana:[1] If anybody approaches an unmarried girl without the permission of her father, the son borne by her is called the damsel's son. Yájnavalkya[2] says: A damsel's child is one born of an unmarried woman; he is considered as son of his maternal grandfather. So Vasishtha[3] declares, the maiden-born son is the fifth: he, whom an unmarried damsel brings forth through lust in her father's house, is the maiden-born son, he becomes his maternal grandsire's son. But Manu[4] says, when a maiden secretly conceives a son in her father's house that son sprung from the Kanyá or unmarried daughter, is called *Kánína* or unmarried daughter's son, and is considered as son of her husband. There is apparently a conflict of the above texts of Yájnavalkya and Vashistha laying down that the Kánína becomes son of his maternal grandsire, with this passage of Manu which again appears on the face of it to be inconsistent, for how can an unmarried woman have a husband to whom, the sage says, the son belongs? Mitra Misra in his Víramitrodaya[5] reconciles these passages by saying that a son produced by an unmarried daughter before her betrothal belongs to his maternal grandfather; but one born of a damsel after her betrothal but before the per-

[1] Sacred Books of the East, Vol. XIV, p. 227.
[2] II, 130.
[3] XVI; 22.
[4] IX, 172; see also Vishnu, XV, 12.
[5] Translation, p. 113.

formance of the marriage ceremony appertains to the husband or the bridegroom to whom she has been betrothed. And the reason assigned by him is that in the first case the father's dominion over his daughter is complete and therefore he acquires dominion or *patria potestas* over the child brought forth by her; but after the betrothal of a daughter and before the completion of her marriage, the father's dominion though partial is not wholly extinguished, therefore the daughter may be called a maiden, and Manu's text is to be referred to a case like this in which the husband's dominion though inchoate at first becomes perfected by subsequent marriage and the son belongs to him. The principle appears to be the same according to which an accession to a property coming into existence after the contract of sale and before its completion belongs to the purchaser.

*Putriká-putra* or the son of an appointed daughter is another kind of son that belonged to his mother's father. He resembles the Kshetraja or the appointed wife's son and differs from a *Kánína* or a son secretly brought forth by an unmarried damsel in the same way as an appointed wife's son differs from a son secretly borne by an adulterous wife. A father had the dominion over his daughter and he had the power of transferring unconditionally his rights over her to another person by giving her away to him in marriage. He was again at perfect liberty to retain his *patria potestas* or dominion over a daughter while giving her conditionally in marriage to a man, with the express stipulation that a son born of her should belong to him in the same way as a Kánína did, and not to the husband and progenitor. A daughter given in marriage with an express agreement with the husband, that the son born of her would be the son of her father is called the appointed daughter, and her son becomes the son of her father. Such an agreement according to some sages is presumed to be implied when the father of the daughter was destitute of male issue; while an express contract is, by others, thought to be necessary to constitute an appointed daughter. Manu does not include an appointed daughter's son in the category of subsidiary sons, he appears to assign to him the same position as a real legitimate son.[1]

The usage of appointing a daughter to raise issue for her father while giving her in marriage bears some analogy to one form of marriage among the Romans, in which the wife was not in *manu* of the husband, that is to say, she did not pass under the power of her husband nor did she pass out of her father's family into that of her husband.

It may be observed here that although the sages say that a father who had no son might appoint his daughter to raise up issue for him, yet looking to the principle upon which the usage was based, it is evident that the father's being

[1] IX, 130.

destitute of male issue was not a condition annexed to the exercise by the father of the power of disposing of a daughter in marriage with the particular contract, but it was simply intended as the circumstance under which a father would ordinarily be disposed to adopt that course.

It is worthy of notice that these six descriptions of subsidiary sons cannot be designated sons by adoption, for their filial relation arises not by any overt act of affiliation on the part of their respective legal fathers, but by the operation of law, the general principle being that a son belongs to the owner of his mother.

*Krita* or a son bought is one who is sold, by his father or by the mother with the father's assent, on receipt of a price, and adopted by the purchaser as his son.

*Dattaka* or Dattrima or a given son is one who is given by his father or the mother with the father's permission and accepted by the donee and adopted by him as his son.

*Svayandatta* or a self-given son is a person who being bereft of his father and mother or abandoned by them delivers himself up to another with an offer to become his son and is accepted by him as such.

The *Kritrima* or a son made is one destitute of his parents and capable of discriminating between right and wrong who is induced by the show of another person's wealth to accept that person's proposal of making him his or her son and thereupon becomes an adopted son.

According to modern usage a man and his wife may jointly or separately adopt a son in this way.

*Apaviddha* or the deserted son is one who being forsaken by his parents is out of compassion taken by a person under his protection and adopted as a son.

These five descriptions of sons may be called sons by adoption as their affiliation depends upon an overt act of their *legal* or adoptive fathers. The idea of transfer of dominion attaches to these five sorts of sons. The father was the owner of his child, and he might therefore transfer his son to whomsoever he pleased by sale or gift; the Krita or the son bought and the Dattaka or given son, are instances of the change of paternity by sale and gift respectively. The Apaviddha or the deserted son, who being forsaken by his parents, is taken by another person and adopted by him, as his son, is like unclaimed property of which the adopter is the finder appropriating it to himself, when the owners have disowned or relinquished their rights over the same. The Kritrima and the Svayan-datta are independent and masters of their own person, and are therefore at liberty to place themselves under the power of another as his son, in the same way as a self-given slave could deprive himself of his freedom and voluntarily submit to slavery.

The Dattaka and Krita forms of adoption resemble the kind of adoption called *adoptio* in Roman law, according to which a person who was in the power

of his parent was transferred to the power of the person adopting him, while the Kritrima and the Svayan-datta adoption bear a close analogy to the *adrogatio* form in Roman law in which the person to be adopted was *sui juris* and not under the power of his parent. There is no substantial distinction between a son made and a self-given son. The only difference between them is that in the Kritrima form the proposal comes from the adopter, and in the other form it originates with the adoptee. The difference again, between a Kritrima and an Apaviddha appears to consist in this, that the former must be of the age of discretion, for his consent is necessary; while the latter seems to be an infant or a foundling incapable of giving or withholding his assent. The capacity of a man to give himself in adoption, when he is forsaken or disowned by his parents is worthy of special notice. The circumstance of a person's being forsaken by his parents means more than is expressed, it is analogous to emancipation according to Roman law, of a son by his father and amounts to disinherison and disseverance of the legal relation between father and son. I may here remark in passing that the importance which the sages attach to the mother while describing these sons by adoption is inconsistent with the status of women in primitive times.

These twelve kinds of sons are enumerated and described by all the sages that have dealt with sonship, excepting, perhaps, Ápastamba. Some of them have included other descriptions amongst the subsidiary sons, raising the number of sons to seventeen. In enumerating the twelve descriptions of sons Manu has omitted the appointed daughter's son, and included the Saudra or a son of a twice-born by a Sudra wife.[1] I have already told you that the appointed daughter's son has been separately described by that sage evidently intending to assign to him the rank of an *aurasa* or real legitimate son. Similarly Baudháyana enumerates thirteen kinds of son, taking *nisháda* or a son by a Sudra wife as a secondary son.[2] A passage of Smriti cited in the Dattaka Mímánsá[3] without the name of its author enumerates fifteen descriptions of sons, including the twelve already described and adding three others, namely, the *Putrika* or the appointed daughter, the Víjaja or the son begotten on another's wife and the Yatrakvachotpádita or the son begotten on any woman. The Dvyámushyayana or the son of two fathers is another description of sons enumerated in the works on Hindu law.

Although a daughter appointed to raise issue for her father, might be similar to a son as the name *putriká* indicates, and have some rights resembling those of a son; yet it is not she, but the son produced by her that is recognized by the sages, as a description of substitutionary son. The appointed daughter is, no doubt declared by Manu to be similar to a son,[4] and her son

[1] IX, 160.
[2] Sacred Books of the East, Vol. XIV, 22
[3] II, 57.
[4] IX, 130.

pronounced to be similar to a son's son;[1] and the following text of Vasishtha may be cited as an authority for regarding the appointed daughter as a son,—"The (third description of son) is the appointed daughter, it is declared in the Veda 'A daughter who has no brother comes back to the male ancestors, returning she becomes their son: on this subject there is this verse—I will give unto thee a brotherless damsel decked with ornaments, the son that may be born of her shall be my son.'"[2] But the drift of these passages taken together with what has been declared in other Codes points to the conclusion that it is the appointed daughter's son that was invested with the status of a son and not the appointed daughter herself; but as she, notwithstanding her marriage, continued under the power of her father as a member of his family, she enjoyed a position somewhat resembling that of a son, although no son might be born of her. It should also be observed that the term *putra* or son, according to Hindu law, means male issue and includes a son's son as well as a son's grandson, and it could by no means include a female descendant incapable of serving either the secular or the spiritual purposes for which a son was desired.

Víjaja or a son produced on another man's wife is a kind of Kshetraja or the appointed wife's son, when by the contract of appointment to raise issue it was stipulated that the son begotten would belong to both the procreator and the husband of the woman.

Yatra-kvachanotpádita or the son produced on any woman, is intended to include a son begotten by a man himself on a woman not his wife, such as a son procreated by a master on his female slave.

Dvyámushyáyana or a son of two fathers, is a son of one or other kind already mentioned when by virtue of an agreement or by the existence of some other circumstance he became the son of the begetter as well as of his mother's married possessor or of an adopter. When a son was begotten on an appointed widow by her husband's brother, who had no son of his own, the son so begotten belonged to two fathers; and similarly the appointed daughter's son is directed to offer *pindas* to his natural father who had no son of his own, and is declared entitled to inherit his property.[3] The idea of a son belonging to two fathers appears to be a later development when the necessity of a son for spiritual benefit was thrust into prominence by the sages with a view to ameliorate the condition of sons.

Saudra is the son of a twice-born by a Sudra wife: the names Nisháda and Párasava are applied to such sons of a Kshatriya and a Bráhmana respectively;[4] by some to the latter. He is a real legitimate son, and is considered as such by Yâjnavalkya, though he disapproves of the espousal by a twice-born man of a Sudra wife. Manu and Baudháyana, however, place him like the son of a

[1] IX, 133. [2] XVII, 15—17. [3] Manu, IX, 132.

[4] Nárada-Smriti, Twelfth Topic, Verse 108: Asiatic Society's Edition.

twice-married woman in the category of secondary sons, evidently with a view to discourage intermarriage between the castes, and so to prevent a confusion that was likely to injure the then recent institution of the caste system which has played a very important part in the civilization of Hindu society.

On a careful consideration of the different descriptions of sons recognized in primitive times, no one can fail to be struck with the idea that the general principle underlying the relation of father and son and of husband and wife, is the notion of one being the property of the other. A person was the owner of his wives and unmarried daughters and a son brought forth by them belonged to him, in the same way as an accretion to a property belongs to its owner, as a calf to the owner of its mother, and as a son of a female slave to her master. And as regards the sons by adoption they could be acquired in the same way in which a property could be gained, with this exception that a man who was *sui juris* was his own master and could give himself in adoption to another.

Procreation by the father was not a necessary element in the conception of sonship, and it could not be so, when so many as ten out of the twelve descriptions of sons were begotten by others. It is worthy of notice that the Sanskrit word *pitri* which is philologically the same as the Latin word *pater* and the English father, is derived from the root *pa* to protect, and means a protector and not a progenitor. It is, however, exceedingly strange that the European text-writers have asserted it to be a fiction of Hindu law, that the Dattaka son should be supposed to be begotten by the adoptive father on the natural mother of the adoptee. There is no foundation in Hindu law for such a fiction to be based upon. It is also inconsistent with, and opposed to, the modern development of the Dattaka son's rights, according to which he is entitled to inherit from the adoptive mother and her relations and not from his natural mother.

Considering the variety of ways in which a man became a father there could be no restriction against his having subsidiary sons by reason of his being already possessed of real and legitimate male issue, for, an adulterous wife and an unmarried daughter might present him with sons. Nor could there be any limit as to the number of secondary sons belonging to a man. The well-known story of king Pándu having five Kshetraja sons by his two appointed wives and, of Visvámitra adopting Sunahsepha when he was already the father of a hundred sons, affords evidence of what the early usage on this subject was, and shows that there was a hankering after sons for purposes other than a religious one which could be secured by a single son in the one case, and was fr"7 secured in the other by the numerous sons already in possession of the adopte)

The natural relationship subsisting between two persons did not stand i the way of one becoming the son of another, for when a man became the fath r of a child borne by his unmarried or appointed daughter, the question cou l not arise in any other case.

Nor was there any restriction as to the age of the person to be adopted; a son made and a self-given son must necessarily be adults at the time of adoption.

With respect to this early usage recognizing so many descriptions of sons, a somewhat important question suggests itself, namely, as to the motive for the recognition of the different kinds of sons or the reason for the hankering after them. The usage had been in existence before the Codes of Hindu law were composed, and its origin cannot therefore be referred to any precept promulgated by them. The way in which the law of adoption has been treated by the comparatively recent Hindu commentaries specially dealing with the subject, and the manner in which the importance of having a son has been extolled, and the adoption of a son recommended by citing from the Codes, texts that generally relate to the real legitimate son and have been laid down for a quite different purpose, may no doubt, lead any one perusing them to the conclusion that the origin of adoption amongst Hindus is to be attributed to the influence of their religion. Accordingly in an early case the lords of the Judicial Committee made the following observations: "The law of adoption owes its origin to the timorous superstition of the inhabitants of India. That people vainly imagining that by leaving male children in this world they secured themselves against the torments of the next, seem to have been so anxious to obtain natural or adopted sons that they have established but imperfect securities against fabricated adoptions."[1] But one should hesitate to accept an explanation, which associates the sacred name of religion with practices based upon immorality and looseness of sexual relation. There is no system of religion known, that countenances any institution partly founded on adultery, seduction and lust. The Hindu religion which is moulded on asceticism, and inculcates the control of passions and suppression of desires as necessary virtues, and sets a high value on female chastity so as to enjoin single-husbandedness for women, is least likely to sanction the immoral usages relating to some descriptions of sons recognized in ancient society. On the contrary, it would appear on a careful examination of the Codes, that instead of favouring the institution of subsidiary sons, the sages disapprove and discourage it on religious grounds. This will form the subject of discourse in my next lecture, and in which it will be discussed at length.

The real explanation of the origin of the law of subsidiary sons seems to be that it is to be traced to several causes at work in the infancy of society. It was partly due to the primitive notion of property in a wife and a child, to the laxity of sexual relation prevailing in ancient times, to the selfish principle of man, and to the exigencies of primitive society. When society was young,

[1] Sootrugun Sutputty v. Sabitra Dye, 2, Knapp's reports, p. 287; (S. C.) P Pundits Privy Council Digest, Vol. I, p. 56.

and before the formation of a regular Government in the modern sense of the term, the partriarchal or the tribal form of rule prevailed, the latter being but an expansion of the former. In the patriarchal form the father was the absolute monarch of the family composed of his wives, sons and slaves. The relation of husband and wife, of father and child, and of master and slave was moulded on one common principle of absolute subordination of the one to the other. The word of the patriarch was the law to be implicitly obeyed by his wives, sons and slaves, who were as it were his subjects. In an agglomeration of rival and inimical families and tribes in the ancient world, the security of life and property and the very existence of a family depended on the number and strength of its members, and there would therefore be a natural desire for an increase of its members and specially of the male members capable of bearing arms who like soldiers rallied round the patriarchal chief at a time of emergency. In this state of things the reason would not be far to seek why a wife was considered as a child-producing machine, and great desire felt for sons. When the patriarchal family expanded into a tribe composed of many families descended from a common stock, or being united with neighbouring families for mutual protection formed into a commonwealth bound together by a community of interest; the internal relation of the members of a family would remain as before, while the honour of a family would depend upon the number of its male members or fighting men whom it could contribute for the protection or advancement of the tribal interests at a time of need. The requirements of the unsettled state of society would raise the importance of male issue, make it a duty incumbent on each member of the tribe to secure sons, and confer special honours on any member possessed of a large number of male children. The possession of three or more children conferred special advantages and honours on Roman citizens, which induced them to adopt.[1] In the Hindu Codes there are passages declaring that the possession of many sons is desirable, but they assign a spiritual reason for it, and so they appear to have invested an existing social phenomenon with a religious colouring.[2] But in the *Rig-Veda* which is a collection of hymns and which is the earliest record of human thought, there are references to the relation of father and son from which it may be gathered that a son was desired for secular advantages alone. The following passage shows that a son was considered the support of his father in his old age :—" O Gods, a hundred autumns are indeed fixed by you as the life of man, within which you have ordained old age for our bodies *when sons become fathers*, destroy us not before the term of our life expires."[3] A son

[1] Sootrugun Sutputty *v.* Sabitra Dye, 2 Knapp's Reports, 289.

[2] Atri,—Jîbananda Bhattacharya's Edition of Smritis, Vol. I, page 17 : Vrihaspati.—Ibid., page 646 ; Brihat-Parâsara, Ibid Vol. II, page 133 ; Likhita, Ibid., p. 376 ; Vishnu, LXXXV, 67.

[3] I, 90, 9.

appears to have been bound to render implicit obedience to the commands of the father as is indicated by the following passage: "The sacrificers do without delay obey the commands of the god of fire and perform what is commanded, in the same way *as sons obey their father's commands.*"[1]

The very same cause that enhanced the value and importance of sons, operated to lower the position of women in ancient times. For in a state of society in which there were constant feuds between different tribes, and the safety of possessions of any one of them depended upon the strength and valour of its members, it is very natural that persons possessed of those manly qualities must hold the highest rank and position, whilst those characterized by physical weakness or bodily defects should be reduced to an inferior position. The natural weakness of the fair sex, incapacitating them for the use of arms, coupled with the fact that their beauty was as much the object of covetousness as any other valuable property, would place them in the category of possessions that were to be guarded and protected from an enemy. The connections in early times of polygamous men with their wives brought under their power either by capture or purchase from their selfish fathers can hardly be called marriages except by a stretch of language. The ill-usage to which women in early times were subjected and to which one description of son owed its origin shows forth in a clear light that they were treated almost as cattle and were not very likely to be attached to the family of their husband. The forcible abduction or willing elopement of women was not uncommon in those unsettled times, and furnished the theme of the two celebrated epic poems, namely, the Rámáyana of Válmíki and the Iliad of Homer.

So high a value was set on the possession of physical strength and prowess, that those members of the family that were destitute of these qualities were considered unfit for inheritance. Baudháyana declares the exclusion of women from inheritance, and cites in support of this position a Vedic text which says: "Women are (*nirindriyás* or) devoid of valour and are therefore useless and incompetent to inherit." The word *nirindriyás* in this text is generally rendered into "devoid of senses" taking the word *indriya* in its ordinary modern meaning of an organ of sense, but while interpreting a text of Sruti the word should be understood in its Vedic sense of heroism, prowess or valour; the ordinary rendering again does not convey any definite meaning. Manu also attributes the inferiority of females to their physical and intellectual weakness, by saying,—'The rule is that women who are devoid of heroism and destitute of Scriptural learning are useless.'[2] Upon the very same principle was based the exclusion from inheritance, of persons born blind, deaf, dumb, or lame and of one suffering from similar bodily disability, who were inca-

[1] Mandala I, Súkta 68, Rik 5. [2] IX, 18.

pable of performing the service required of a male member in early times. To a student of Hindu law, it appears inexplicable why the law should be so hard upon those to whom nature has been so unkind. But it must be remembered that the law by which the Hindus are now governed is contained in the ancient Codes, embodying usages shaped by the exigencies of early society, and is substantially the same as it was three thousand years ago, subject, however, to changes and modifications, which are very slight compared with the length of the period during which they have been brought about.

The abject condition of women in early times appears to be inconsistent with the mother's power of selling or giving a son in adoption which seems to be recognized by the definitions given by the Codes, of the son bought and the son given. The Codes, however, were composed at an advanced stage of Hindu society when the kingly form of Government was thoroughly established, and these therefore might have engrafted on an early institution a modification based upon the natural rights of a mother. We have already seen that Vasishtha recognised the competency of both parents to give, sell or abandon a son, but he modifies this general rule by adding,—'But a woman shall neither give nor take a son except with the assent of her lord.' The status of women again under the Codes is that of perpetual pupilage; they are to live under the control of their father, husband or their kinsmen and are declared unfit for independence in any stage of their life. A mother therefore could exercise the power independently only when there was no one to take care of her.

The power of a mother to give or sell a son in adoption, as well as the condition that a man should be destitute of both parents in order to be competent to give himself in adoption either as a self-given son or a son made, appear to be most anomalous. An infant son must no doubt be naturally under the care of the mother after the death of the father, and she therefore may give her son in adoption, should there be no person to control her action; but a self-given son and a son made must be adults at the time of their adoption and *sui juris* or perfectly independent, if their father be dead; and, considering the subordinate position of women in early society, their widowed mother should, instead of exercising any authority over them, be placed under their control. This early usage of subjection of women to their male relations, is also recognized by Manu,[1] Yajnavalkya[2] and other sages who declare women to be unfit for independence in any period of their life, and provide that sons are the guardians of their widowed mothers. It is therefore difficult to understand the reason why the mother's existence should affect the right of a man to disp e of himself in adoption. There are, however, passages in the Codes, laying do n that sons are not independent when their father is alive, nor are they so. wh n

[1] V, 148 and IX, 3.

[2] I, 85.

their mother is living. And Manu says that the mother is entitled to reverence a thousand times more than the father.[1] These somewhat contradictory rules, some declaring the mother's dependence on her son, and others propounding the son's dependence on the mother, may be reconciled by supposing that the former represented the existing usage and referred to matters outside the precincts of the family, while the latter provided a moral or religious duty on the part of sons after they have become independent by the death of the father to live under the loving control of their mother, in so far as regards the internal management of the affairs of the family. And the rule laying down a son's dependence on the mother appears to be levelled against partition by brothers during the mother's life, when their common abode is ordained by the Hindu sages: for nothing can wound the feelings of a Hindu widowed mother so much as the disruption of the joint family and the separation of her sons during her life. It follows therefore that the descriptions given in the Codes of a self-given son and a son made in so far as they require that the sons should be destitute of their mother, were of later growth, and contemplated what *should* be rather than what *was* the usage.

The joint family system which has been described as the cherished institution of Hindu society is a continuation of the ancient patriarchal form of family government. It marks the stationary character of Hindu society, over which ages have passed away without effecting any material changes, and it has been well said that in India the past is present, though it must be owned that it is fast passing away. It originated in natural relationship, acquired an artificial character in primitive times by the exigencies of ancient society, and was held together by community of interests. Its continuance has not been disturbed by those social, religious, and political changes that have caused the disruption of the system in other countries, where it had once existed. In modern times society is considered to be composed of individuals and the body of laws governing it are directed to individual rights, duties and liabilities. But the joint family was the unit of society in ancient times, and has been so in India all along: and the Hindu law in all its branches is moulded to a great extent by that institution. The severity of the patriarchal Government has no doubt been softened down to a great extent but its traces are discernible in many rules of the Codes.

The Hindu lawyers, as I have already said, lay it down as a religious duty on the part of sons to live together as members of a joint family so long as their parents are alive. The continuance of the institution, therefore, gained support from the Hindu religion. It may be interesting to notice here the contrast between this rule of Hindu law and the first part of the following precept in the Bible, which says,—Therefore shall a man leave his father and mother, and

[1] II, 145.

cleave unto his wife and they shall be one flesh." The latter part, however, is almost identical with the following text of the Hindu Scripture,—"They shall be one bone one flesh and one skin."[1] Religion has exercised a potent influence on the progress and development of society, and the family relation in the social structure of modern European nations professing the Christian faith, is to some extent at least due to the above precept of their Scriptures.

I have already told you that a family in ancient society was a small state by itself, of which the patriarch was the chief and his wives, children and slaves were the subjects. The several meanings of the word *prajá* show how the same word conveying one meaning in ancient times is by analogy extended to other things that came into existence in the course of social progress. The Sanskrit word *prajá* is philologically the same as the English term progeny, and originally meant a descendant. As the relation subsisting between a father and his children in primitive society, resembled the relation of a king with his subjects in later times, the word came to signify a subject of a king. The subjects of an Indian king had to pay an income-tax to him, and as the majority of them practised agriculture, they had to deliver a certain share of the produce yielded by the land cultivated by them to officers appointed by the king to collect the tax: the payment of the tax in that way was the distinctive feature of the relation between the subjects and their king. And when the ruling authority transferred its rights of receiving the share of produce to the zemindars subject to the payment to Government of a fixed revenue, and introduced the system of land tenures now found in this country, the word *prajá* came to mean any tenant, since the relation of landlord and tenant is similar to the relation previously subsisting between the king and his subjects, so far as the payment of the tax which is now called rent, is concerned.

In a patriarchal family the rank and position of a son depended entirely on the pleasure of the father, amongst the various descriptions of real and subsidiary sons, and there does not appear to have been any inherent superiority in any one description, over another. All the Codes, however, agree in assigning to the real legitimate son, the highest place: but this rule embodying what appears to be quite natural in an improved state of society, could not be expected to obtain in early times when looseness of sexual morality prevailed. A son who was agreeable to the father on account of the possession of virtues or for other reasons would be entitled to the first rank. Accordingly we find that Visvámitra conferred the position of the eldest son on his adopted son Sunahsepha who was endowed with excellent qualities. On his proposing his intention to his hundred sons, the fifty elder ones did not like the idea, and were therefore cursed and expatriated from the family. But the younger fifty sai

[1] Dáyabhága Ch. IV, sect. II, para. 14.

to their father,—"What our father tells us, in that we abide; we place thee (Sunahsepha) before us and follow thee,"[1] and they obtained their father's blessings.

There are several stories and legends showing that a capricious or whimsical father did inflict any punishment on a son that incurred his slightest displeasure. We have already referred to a passage in the Rig-Veda indicating implicit obedience by sons to their father's commands. The punishment inflicted by Visvámitra on his fifty sons who disapproved of his proposal to give the first rank to his adopted son appears to us to be out of all proportion to their offence. Nachiketá displeased his father by repeating a question to him and was in consequence condemned to severe punishment.[2] Dasaratha sent his son Ráma to exile for fourteen years, without any fault on his part. And Jajáti outcasted his sons that refused to comply with a certain request of his. These instances are sufficient to show the state of subjection in which sons were placed.

The wives, sons and slaves held the same position in relation to the patriarch, and they all laboured under the same disabilities. They could not hold any property, and whatever they earned by their personal labour belonged to the father of the family. They themselves were in the category of property owned by the father, and as such could not of course own property. Accordingly Manu says: "A wife, a son, and a slave are devoid of property; whatever they acquire becomes his whose they are."[3] The same principle is found in Roman law. The stringency of the rule, however, was gradually modified in both systems by recognizing the rights of a wife and a son to certain special kinds of property. The son's position has improved to a very great extent under the Mitákshará, while according to the Dáyabhága which is unfavourable to the right of sons against their father, the father is entitled to half of the self-acquisition of a son by reason of his being the father of the acquirer.[4]

According to the status assigned by ancient law to a wife, a son, and a slave, they could have no right as against the husband, the father and the master respectively. There could therefore be no litigation between husband and wife, between father and son or between master and slave. A passage of Smriti cited in the Mitákshará[5] says,—"Even when there is a cause of dispute between preceptor and pupil, between husband and wife, between father and son, or between master and slave, no action is maintainable" And this is quite consistent with the ancient law of personal status, but it is a proposition which could not be assented to in its literal sense by the Mitákshará, which has construed the law laid down by the sages in such a way as to confer important rights on sons, and to raise and improve the position of women.

[1] Aitareya Bráhmana, cited in Dattaka-Mímánsá, I, 12.

[2] Kathopanishad Asiatic Society's Sanskrit Edition, p. 77.

[3] VIII, 416. [4] Dáyabhága Ch. II, paras. 65—72. [5] On Yajnavalkya, II, 32.

Accordingly it interprets the above passage as laying down a rule of moral obligation intended to discourage litigation between such persons that should not come as antagonists before a Court of Justice. It appears that no such Action could be maintained at first, but with the progress of civilization, it was conceded that although no such Action lay as of right, the king could be moved by the aggrieved party to interfere and institute proceedings against the wrong-doer. This is somewhat similar to the interference by the English Courts of Equity where the Common law Courts failed to grant any relief. A litigation between a father and a son is so much disapproved by the sages that they provide punishment for persons who instead of endeavouring to settle the dispute amicably, agree to appear before the Court as witnesses in the cause.[1] In the same treatise is cited a text of Nárada, which says.—"It is pronounced by those versed in law that an action of one against many, of women, and of a slave shall not be entertained." And this passage so far as regards females is construed to mean that an action by a woman during her husband's life is not maintainable by reason of her dependence on the husband. It appears to lay down a rule resembling one of English law, in force till lately, according to which during coverture no action could lie by or against the wife; but the husband could sue or be sued instead of her.

A son being incapable of holding property, it would follow that he was incompetent to perform the religious ceremonies which might be celebrated at considerable expense. The Mitákshará School, however, contends that a son is bound by the Sástras to perform several ceremonies during the father's lifetime, and upon that ground argues that a son ought to be admitted as a coparcener of the father, with respect to ancestral property: how else is he to obey the dictates of the Sástras?[2] But having regard to the principles of ancient law and usage there cannot be any doubt that the father of the family alone could perform the religious rites for the benefit of his family. And notwithstanding the multiplication in later times of religious duties imposed on individuals, the modern practice in joint families is the same as the old one. No person whose father is alive can even now perform the *Srádha* ceremonies which are the foundation of the doctrine of spiritual benefit, excepting the Vridhi Srádha or the auspicious Srádha rite for prosperity, which is performed on the occasion of an initiatory ceremony of a son or a daughter.[3]

I have already observed that the condition of a wife, a son, and a slave in ancient society was almost the same, so far as the authority, over them, of the husband, father and master respectively, was concerned; and their authority was absolute and uncontrolled by any legal restraint. But the difference in their condition would manifest itself upon the death of the father of the family.

[1] Yajnavalkya, II, 239. [2] Víramitrodaya Ch. I, Sect. 23; Translation, p. 3.
[3] Dáyabhága, Ch. XI, Sect. VI, para. 29.

On the happening of that event the sons became *sui juris* or independent and competent to exercise a father's power over his own family and dependents. There was no change in the condition of a slave, who passed to the heir of the deceased master, like other property left by him. As to a wife's position after the death of the husband we have already seen that at first it was similar to that of a slave, and she belonged to the heir of her lord. There was a gradual improvement in the condition of women who ceased to be considered in the light of property belonging to their husband. They held a position intermediate between those of a free person and of a slave; they were not entitled to independence, but their dependence did not bear resemblance to that of a slave. They were thought to be incapable of exercising discretion and therefore were like minors placed under the guardianship of a tutor, with this difference that their minority never ceased. If they re-married after the death of the first husband, they were placed under the power of the second husband. If they did not re-marry they continued to live under the care and control of their son or other male relation of the husband's family.[1]

But although the death of the father of a family rendered his sons completely, and his wives to a certain extent, independent, yet the idea that the deceased person had dominion or proprietory right over his sons and wives survived and is exemplified by the rules of Hindu law regarding the payment of the debts of a person dying without leaving any property.

The personal liability of a son or a remoter male issue to pay the debts of his father or other paternal ancestor although the former may not inherit any property from the latter is to be attributed to the principle that those on whom the deceased exercised *patria potestas* and dominion were like his property. Yájnavalkya declares: "When the father is remotely absent or dead or afflicted with a lasting disease his debts are payable by his sons and grandsons."[2] The commentators of the Mitákshará School concur in the conclusion that the liability of male issue to discharge the debts of a deceased paternal ancestor is independent of his inheriting any property from, or through, him. In Bombay this rule of Hindu law was strictly enforced till an Act was passed by the Legislature to exonerate a son from his personal liability to pay his ancestral debts.[3]

There is apparently a very curious rule of Hindu law according to which a man taking the wife of another is declared liable to pay the latter's debts. Thus Yájnavalkya ordains: "Whoever takes the heritage or the wife of a person is liable to pay his debts."[4] While commenting on this text the Mitákshará says that a person who takes under his protection the recusant wife of another, or takes the widow of a deceased person is bound to pay his debts: and

[1] Manu, V, 148 and IX, 6; Yajnavalkya, I, 85. [2] II, 50. [3] Bombay Act, VII of 1866. [4] II, 51.

explains the principle of this rule by citing the following passages of law :—"He who takes the widow of a man dying without leaving any male issue or any property, shall be liable for the debts of her husband; for she is ordained his property;" and "He who takes another's wife, takes his property." A text of Kárshnájini, however, goes further and directs that the taker of the wife is to bear the expenses of the deceased husband's funeral ceremonies; it runs as follows :—"A son, a pupil, the widow, the father, a brother, a daughter-in-law, the preceptor, one taking the widow, or the heir shall perform the exequial rite and the ceremony of offering the funeral cake and the libation of water"[1] All these rules studied in the light of the principles of early law are perfectly intelligible; they are all based on the theory of property in sons and wives.

[1] See Nirnayasindhu original Sanskrit (Bombay Edition of 1883), page 325.

## LECTURE II.

# DOCTRINE OF SPIRITUAL BENEFIT AND TWELVE KINDS OF SONS.

**Hindu society civilised by means of religious influence—India the land of religion.—It has no place in the political history of the world.—But holds a prominent position in its intellectual and religious history.—Probable causes of religiousness of Indians—Polytheism—Ancestor-worship—Its origin—New character given by sages to ancestor-worship—Derivation of *putra*.—Doctrine of spiritual benefit conferred by sons.—Introduced for their benefit—Real legitimate son alone competent to confer spiritual benefit—Subsidiary sons are not so.—Manu,—Baudháyana,—Vasishtha,—Ápastamba,—Doctrine not the origin of, but invoked for discouraging, secondary sons.—Marriage improved by that doctrine—Approved forms religious.—Disapproved forms not so,—Sacredness of marriage—Patní—Divisions of wives into *patnís* and non-*patnís*—Caste, form of marriage, virginity at the time of marriage, non-marriage with another man, are conditions of *patní*—Marriage and fidelity—Early marriage—Caste system and its effects on Hindu civilization—Effect of rules of marriage on sonship—*Patní* and real legitimate son—Division of sons into real or primary, and substitutionary—Earlier divisions of sons into two groups—*Dáyáda* and *bandhu*—First stage of classification of sons—Vishnu—Vasishtha, Yájnavalkya—Yama—Nárada—Hárita—Devala,—Principles of this division—Second stage—Manu—Baudháyana—Gautama—This an improvement on moral grounds—The last stage—Vrihaspati—Effect of Codes on sonship—Explanation of the Doctrine of spiritual benefit.**

In the preceding lecture I have considered at some length the nature and character of the early institutions of marriage and sonship. The conception in ancient society of a wife, a son and a slave was moulded on one common principle of absolute subjection. The law of personal status in the earliest times consisted of a relation between two persons, characterized by the exercise of unlimited power on the one side and the state of abject submission on the other. The prominent idea that pervaded the relation between husband and wife, between father and son and between master and slave, was that the one was placed under the power and dominion of another. The status of the weaker sex was most wretched and deplorable, they were looked upon and treated more like lower animals than human beings. Marriage conveyed no more than the idea of acquiring dominion over a woman: and sexual morality, fidelity or chastity did not form an element in a marriage union, which again did not carry with it the idea of permanence, and was liable to be dissolved at the option of the husband by a sale or gift of his wife. The grossness of the usages to which divers descriptions of subsidiary sons owed their origin shows forth in a clear light how lax was the marriage tie, and how loose the sexual morality in ancient society. The unlimited power again which a man possessed to an unreasonable extent over his sons

and wives was liable to great abuse. Implicit obedience was rigorously exacted from them, and any one of them incurring his slightest displeasure was liable to any punishment he chose to inflict, and ancient law offered no protection to a son or a wife against a whimsical father or a capricious husband. Nor can it be expected that the different kinds of sons belonging to a man would be the object of his love and affection, when the foundation of that natural safeguard was wanting in most descriptions of sons. The loving control which a Hindu father even now exercises over his adult sons, and which is willingly and cheerfully submitted to, was not possible in the old times when the state of the family relation was of a different kind. These early usages were felt as great evils when society advanced in civilization. The Hindu sages set themselves the task of improving society by inculcating rules of higher and purer conduct, calculated to suppress the laxity of marriage union, the looseness of sexual morality, the institution of subsidiary sons, and the improper exercise of *patria potestas*. They endeavoured to impart a sacred character to marriage, to impress the importance of female chastity, to discourrage the system of affiliation, and to ameliorate the condition of sons and wives; and in order to accomplish these objects they had recourse to the influence of religion, which formed the chief, if not the sole, instrument by means of which Hindu society was civilized.

The civilization amongst the Hindus took entirely a religious direction; and India may very appropriately be called the land of religion. Here all conceivable systems of theological doctrines arose and are still prevalent, ranging from polytheism to monotheism and from the Sánkhya atheism to the Vendantik pantheism. Although there is very great divergence between the different systems of religious philosophy, as regards many important matters maintained by them, yet there are certain cardinal points which are common to them all and which constitute the principles of Hindu religion. They are, the eternity of the human soul; its metemsychosis or continued deaths and births without interruption, or the assumption of different bodies mundane or celestial one after another; the *Adrishta* or that invisible double force the result of its virtuous or vicious deeds in the past period of its existence in the various forms, influencing the condition of its present and future existence; and the *moksha* or liberation of the soul, or its deliverance from the necessity that ties it to a body of one form or other, which forms the *summum bonum* or the end of man, and on the attainment of which the soul enters into a permanent state of beatitude. The *summum bonum* of the Hindus, is founded upon the assumption that there cannot be perfect and u mixed happiness in any form of existence in which the soul is imprisoned in t tabernacle of a body though it be a heavenly one. The theory of Adrishta or th invisible dual force, the effect of a man's own deeds in the past, determining t condition of his present life, explains the inequality in the condition of men; a the belief in it is calculated to make one contented with his present state, ho

ever miserable it may be, though at the same time it is likely to produce inactivity, and discourage attempts to better one's own condition in this life.

These principles are so widely disseminated in Hindu society that every Hindu whatever his position in life may be, has his mind thoroughly imbued with them especially with the idea of the *Adrishta*. The operation of these doctrines has created a patient and enduring state of mind which calmly and cheerfully bears the ills which flesh is heir to. They have at the same time produced a spirit of apathy and helplessness that would not stir to adopt means for avoiding preventible evils. To foreigners it appears utterly inexplicable how the poorest classes of Hindus living amidst pinching poverty could be so cheerful as they are; not knowing that their buoyant spirit is due to the belief in the truths of religion. The sense of individual responsibility, and the belief that the present life is transient and is but a point in an infinite line of existence have diverted the Hindu mind from exertion to improve his condition and from combined action for the purpose of common good in this world, of which each parson thinks himself to be but a temporary sojourner. The Hindus let things take their own course, and they themselves sit idle like mere lookers on. The highest spiritual development of man according to Hindu religion, being the withdrawal of the mind from external objects and pleasures, the attainment of worldly prosperity would be inconsistent with the religious spirit of Hindus. Such a people is not likely to attain political greatness, and there is no regular political history of this country. The Hindus therefore have no place in the political history of the world. But it should be observed that progress in religion and attainment of political greatness are somewhat opposed to each other. Political greatness which means the aggrandisement of one nation at the expense of another, cannot be achieved except by infringing the rules of religion. Religious teaching may contribute to make a people politically powerful. But the political creed must necessarily be to a great extent dissociated from religion. The political greatness or degradation of a people therefore is no test for judging the truth or falsity of its religion. The political degradation of the Hindus may be due to their following the dictates of their religion in practice, but it is most unreasonable to assert this as proving the Hindu religion to be false. There cannot be any doubt that if the Christian nations of modern Europe be real followers of Christ, their political greatness would vanish in no time, and they would very soon be placed in the same position with the Hindus; for warlike habits are equally opposed to the s ·it of Christianity.

Although the Indians have no place in the political history of the world, y they hold a prominent position in its intellectual and religious history. I ectly or indirectly India has given religion to the greatest portion of man- k d. The Buddhistic faith which originated in India and the founder of which v s a Kshatriya prince, is professed by far the greater portion of Asiatic na-

tions. Christianity and Hinduism appear to have some close connection with each other, in so far as their teachings bearing on practical duties are concerned. Self-control, self-sacrifice, meekness, sympathy, altruism and contentment are virtues taught by both systems. The theological doctrine of the Trinity appears to be similar, if not the same, in both systems. The allusion in the Bible that eastern sages went to visit Christ at His birth may be taken to indicate some sort of connection with Hindu Yogis or saints. There is so striking a resemblance in some points relating to the birth and early life of the Indian Krishna and of Christ that some writers go so far as to trace the origin of Christianity to India. It may, however, be fairly argued that Christianity owes directly or indirectly some of its doctrines to Hinduism. There is one point, however, in which the two systems are at divergence; the Christian doctrine of equality of men has to a great extent contributed to the greatness of the modern European nations, whilst the caste-system which at its inception had a very useful bearing on the civilization of Hindu society, but which was converted into a hereditary institution by the selfish policy of the Bráhmanas, had a blighting effect on Hindu society, although it created virtues of necessity amongst the lower classes.

It is difficult to ascertain the cause or causes that have given a religious direction to the Hindu civilization. Several causes seem to have operated in diverting the Hindu mind from the study of nature and its powers, which has resulted in the discovery of the truths of modern science, and led to those wonderful inventions that have promoted human happiness to a marvellous extent. It may be that the fertility of the Indian soil yielding in abundance the necessaries of life with the application of the slightest labour, coupled with the enervating influence of the climate, rendered active and enterprising pursuits unnecessary, unsuitable and disagreeable, and made the Hindu mind more subjective and contemplative. Or it may be that the gorgeous aspect in which nature presented itself in its loftiest mountains, its mighty rivers, its exuberant vegetable products, it variegated animal kingdom, and its bright firmament, overawed the mind and excited the imagination which accounted for all the wonderful natural phenomena by ascribing them to the direct agency of supernatural beings. Or it may be the supremacy of the Brahmanical class originally composed of the learned Hindu families who made religion their profession and learning their monopoly, from which the other classes were practically excluded, and who also succeeded in establishing themselves as the head of the Hindu community and holding a rank superior to that of even the king and royal caste, holdi in fact, the same position in India, as the Pope did at one time in Europe who commands were obeyed even by the kings, that conduced to the religious tenden of the Hindu society. Whatever might be the cause, the fact is that the Hin mind was occupied with ideas relating to the past and the future existence man; and the present, however, was attended to in a lesser degree as bein merely the connecting link between the two.

Religion is an inherent part of human nature, and the earliest yearning of the human heart manifested itself in polytheism or the worship of numerous deities supposed to preside over the different regions of the universe and to govern the elements and the natural phenomena. The Rig-Veda, which is the earliest monument of human thought is a collection of hymns addressed to the deities such as have been described above, that were chanted at the time of their worship. They were worshipped with ceremonies such as could be conceived for honouring a guest of the highest respectability. The choicest things that were regarded as delicious were collected and set apart for offering to the gods. The Homa ceremony consists in offering to the holy fire the clarified butter so much prized by the Hindus. The fire, the most potent natural agency known to the ancients, was worshipped by all the nations of antiquity. It was the emblem of life and power, and was believed by the Hindus to be the mouth-piece of all the gods. The custom of maintaining fire continually burning in one's house was observed by the Hindus as well as by the Romans. It did perhaps owe its origin to the ignorance of any prompt method of making fire at one's pleasure. It should, however, be observed that there is no indication of idolatry in the Rig-Veda, but the deities worshipped were all invisible beings.

Like the invisible gods the invisible souls or spirits of departed ancestors were also worshipped with similar ceremonies. The idea of an immortal spirit residing in the human body was conceived by the Hindus from the earliest times. The origin of the idea may be traced, specially by a materialist, to the same state of mind that explained every sustained action by ascribing it to the direct agency of some invisible spirit, the human soul being as it were the presiding deity of the body. And later on, the idea was extended to the animal and vegetable world, more definitely when the doctrine of the transmigration of souls arose. The state of the human soul after the dissolution by death of the bond that confined it in the material body was determined by its virtuous or vicious conduct in life. The *manes* of departed ancestors that were distinguished by their virtuous deeds were associated with gods in heaven, and were themselves capable of doing good or evil. The sacrifice in honour of the deceased ancestors was performed, not for the purpose of conferring any benefits on them, but with the object of invoking their grace. The origin of ancestor-worship is to be traced to the same hope and fear that induced the ancient people to perform sacrifices in honour of the gods. To propitiate them in case of suffering any evil, or to induce them to confer prosperity in this life was the motive for worshipping the gods as well as the *pitris* or the spirits of departed ancestors.

The fifteenth hymn in the tenth Mandala of the Rig-Veda, addressed to the *pitris* or the spirits of departed ancestors, used to be chanted at a sacrifice for honouring the *manes* of ancestors. It shows that the ancestor-worship was made

not with the object of conferring any spiritual benefit on them but with a view to invoke their aid and protection. This hymn classifies the ancestors into three ranks, namely, good, indifferent, and bad according to the nature of their conduct in this world, and discloses that the condition of departed spirits in the next world is determined by their own merits and demerits, being the effects of their virtuous or vicious actions in this world; and those ancestors only who were virtuous in this life are associated with the gods in heaven. A few extracts from this hymn may be cited here to illustrate what is said above.

"May the superior, mediocre and inferior *pitris* being kind to us accept the burnt-offering. They are unlike the wild dogs, and knowing our preparation for the sacrifice have come to protect our lives; may they protect us when invoked.

"I offer now my salutation to the *pitris* who have departed to the *pitriloka* or the heavenly region for the *manes*, either long since or lately, and who are situated in the terrestrial sphere or are with the fortunate beings (gods).

"I feel that the *pitris* well aware of my reverence are come, and I have got the means of completing the sacrifice without any impediment: may the *pitris* who are come and seated on the kusa grass partake of the *soma* juice and the *svadhá* or sacrificial food.

"O *pitris* seated on the kusa grass! grant us your protection; I have prepared these offerings for you, enjoy them: may you come and give your happy protection, grant us prosperity and make us sinless.

"These agreeable sacrificial objects are spread on the kusa; may the kind *pitris* that are invited come and hear the prayers recited here and praise (or approve of) them: may they protect us.

"O *pitris!* you all sitting to the south by placing your knees on the earth praise highly this sacrifice. We are mortals and if we be guilty of any fault, destroy us not for it.

"Come, O god of fire! with thousands of those ancient and later fathers, seated in the solar region and adorers of gods, who are true, who are eaters of oblations and drinkers of libations, and who are received into the same chariot with Indra and the gods.

"Do thou O self-resplendent god of fire! along with those (fathers) who whether they have undergone cremation or not, are gladdened in heaven, by our oblation—grant us this (higher) vitality and a body according to our desires."

The thirty-fifth hymn of the seventh mandala is addressed to all the go and includes the departed ancestors. The fourth hemistich of the twelf stanza runs thus, "May the *pitris* or the departed ancestors be favourable to o prosperity in our invocations." The fourth stanza of the fifty-second hymn of t sixth Mandala says,—"May the rising dawn protect me; may the swellin rivers protect me; may the firm mountains protect me; may the *pitris* presen at the sacrifice for gods, protect me."

The departed ancestors, however, could more easily be propitiated than the gods; their descendants were supposed to have a claim upon their aid and protection. Thus the first hemistich of the third Rik of the one hundred and sixth hymn of the first Mandala says,—"May the fathers, who may be easily invoked, protect us."

These passages are sufficient to show that the ancestor-worship did not owe its origin to the belief that it is conducive to the spiritual benefit of the souls of the departed ancestors, but it was done by the worshipper with the object of securing his own prosperity, by favour of the departed ancestors propitiated by the ceremony.

The ceremonial of ancestor-worship observed at the present day, also leads to the same conclusion.[1] The person performing the ceremony, no doubt, is to make, according to the ritual, a formal declaration in modern Sanskrit, that he celebrates it, being desirous of endless heavenly happiness of his ancestors, but the tenor of the whole ceremony and the Vedik prayers recited in the course of the ritual show that the object is not so much to benefit the ancestors as to propitiate them and to induce them to become favorable to the worshipper and grant him prosperity. I may here give as an instance one of the prayers:—"May our ancestors who are merciful and who were consumed by fire (on the funeral pyre) come here by the roads frequented by gods, and may they being gladdened by the sacrificial food in this sacrifice praise it and protect us."[2]

But it should be observed here that the word *pitri* or father used in the Rig-Veda to designate objects of worship, has received a novel interpretation from commentators, which is at variance with its ordinary meaning and is inconsistent with the natural interpretation of the passages of the Rig-Veda in which it occurs. In later works dealing with creation, *pitris* or fathers are represented as being an order of demigods created by God before the creation of man.[3] This order of beings is subdivided into three classes, namely, Vasa, Rudra and Áditya; and the word 'fathers' is interpreted to refer to these beings. Manu says that the order of beings called *pitris* that are the progenitors of the Bráhmanas are named Agnidagdhás, Anagnidagdhás, Kávyas, Vahrisadas, Agnisvattás and Saumyás.[4] But you will find that these words are employed in the Vedas to describe the departed ancestors, and do not indicate that they are names of a different order of beings. The reason for putting such a construction appears to be that the ordinary natural meaning of the word *pitri* in the hymns referred to would be opposed to, and inconsistent with, the theory of the divine origin

[1] See Párvana Sráddha in the Bráhmana-Sarvasva and the Sarva-Sat-Karma-Paddhati.

[2] White Yajur Veda, Ch. XIX, Kandiká, 58.

[3] Taittiríya Bráhmana ii, 3, 8, 1; Manu i, 37; iii, 199—201; Vishnu-Purána, Bk. i, Ch. V, 28, 33 and 34; Váya-Purána, Ch. IX, 12—15.

[4] Manu iii, 199.

of the Vedas, according to which the scriptures cannot be supposed to contain a hymn addressed to the spirits of departed men.

The usage of ancestor-worship, however, served a very important purpose in the hands of the Hindu lawgivers who impressed upon it a new character with the object of improving the relation between the sexes, and raising the condition of sons and wives whose position in early times was no better than the condition of slaves. The authors of the Hindu Codes extol the possession of male issue as a means of perpetuating one's name in this world and attaining heavenly happiness in the next. They have thrust into prominence the capacity of a son, specially of a real legitimate son, to confer spiritual benefits upon his father and other ancestors by means of the ceremony of ancestor-worship. But there are many passages in the Vedas showing that the soul of a deceased person attains heaven and is ranked with the gods, by dint of its own merit. That any ceremony performed by a son or other descendant conduces to the spiritual benefit of his deceased ancestors—is a later idea conceived and taught for the benefit of sons and probably of the priestly class. These lawgivers, however, admit the Vedic principle upon an extension of which the doctrine of transmigration of souls is based: and they represent the state of liberation or *moksha* as being the highest human aspiration to be attained by one's own virtuous conduct independently of any spiritual service that may be rendered by a son. But that state of spiritual development could be attained by those only that are masters of religious learning, and are averse to the pleasures of the world, and capable of restraining the passions and suppressing the desires, that are the springs of human action, and sources of misery. As for the generality of the people wedded to the pleasures of the world, these sages prescribe different duties suitable to the capacity of the various classes, and as a reward for discharging them, they hold out hopes of heavenly happiness which is quite different from the permanent beatitude set forth as the highest spiritual aim to be aspired to by mankind.

With a view to fortify the doctrine of a son's capacity to confer spiritual benefits upon his father, some of the sages have given the derivation of the word *putra* or son in such a way as to show that its etymological meaning is "the deliverer from the infernal region called *put*." Thus Manu[1] and Vishnu[2] say,—since a son delivers (त्रायते) his father from the hell called *put*, therefore he is named *put-tra* by the Self-existent himself. But it should be observed that the word throughout the Rig-Veda, is spelt as *putra* and not *puttra*; and its Vedic etymology and meaning appear to be different from those adopted these later lawgivers. What is common in both is that a son is a person w aids and assists; but according to the former he does so in a secular point

[1] Manu IX, 138.

[2] Vishnu XV, 44.

view, whereas, agreeably to the latter, in a spiritual sense. Yáska the first Sanskrit lexicographer whose authority is often cited by Sáyana the celebrated commentator of the Vedas, in support of his exposition of the text, gives both the meanings in a modified form. He says "A *putra* is one that aids much, or assists in old age, or delivers from the hell called *pu*." It should be noticed that, although the last meaning given by Yáska is similar to that given by the two sages, yet it is consistent with the Vedic spelling of the word. I have not met with any passage in the Rig-Veda in which the word *putra* has been used in the sense of deliverer from the infernal region.

This fanciful derivation of the word *putra* is put forward to show that a son is necessary for the purpose of securing against the torments of the infernal region. It is further represented that a Bráhmana is born a debtor to three classes of beings: to the *rishis* or propounders of the Shasters, for the study of them; to the gods, for the performance of sacrifice; and to his ancestors, for offspring. And he is absolved from these debts who has a son, has performed sacrifices and has studied the sacred literature.[1] Manu says: "When a person has discharged his obligation to the sages, to the *manes*, and to the gods, let him apply his mind to final beatitude; but low shall he fall, who presumes to seek beatitude, without having paid these debts. After he has read the Vedas in the form prescribed by law, has legally begotten a son, and has performed sacrifices to the best of his power, he may then apply his heart to eternal bliss; but if a Bráhmana have not read the Vedas, if he have not begotten a son, and if he have not performed sacrifice, yet shall aim at final beatitude, he shall sink to a place of degradation."[2] But this is inconsistent with what the same sage has propounded in another place, namely, that thousands of life-long students leading a life of celibacy have attained to heaven without leaving any son.[3]

The condition of absolute dependence in this world, of a son upon his father was sought by the sages to be ameliorated by fostering the belief of absolute dependence of a father upon his son in the next, for spiritual purposes. A son not only saves his father's soul from falling into a region of torment, but also enables it to attain blissful regions of heaven. A passage of Sruti cited in the Dattaka-Mímánsá, says: "Heaven awaits not one who has no male issue." Manu declares: "By a son a man conquers the heavenly regions, by a son's son he secures the enjoyment of them for an endless period, and by a son's grandson he reaches the solar abode."[4] So Yájnavalkya says: "Because sons, grandsons and great-grandsons are the means of continuation of lineage, and of attainment o heaven; therefore wives should be espoused and should be guarded well."[5] We have already seen that the obligation to pay the debts of ancestors, due to

[1] Dat. Mim. 1. 5. [2] Manu VI, 35—37. [3] Manu V, 159.
[4] Manu IX, 137. [5] Yájnavalkya I, 78.

creditors devolves on male issue. Failure to pay one's debts is followed by a degraded condition in the next world. A man who does not repay his debts is declared liable to be born after death in his creditor's house, as a slave, a servant, a woman, or a quadruped.[1] But he is exonerated from this liability if he has male issue. Thus Vasishtha declares: "If a father sees the face of a son born and living, he devolves his debts on him and obtains immortality; it is ordained in the Sruti, Endless are the heavenly regions of those having sons, heaven awaits not one who has no male issue."[2]

Most of the above texts, laudatory of the celestial bliss derived from the male issue, and cited by modern commentators in support of the theory of the obligation to adopt, appear on a careful study to refer to the *aurasa* or real legitimate son alone. While other passages from the generality of their language may apply to all descriptions of sons, real or subsidiary, without any distinction. The legitimately begotten son, however, holds the highest place as regards the capacity for conferring spiritual benefit. When defining the real legitimate son, Manu declares that he is the first in rank.[3] It is declared that a father is entitled to heaven by the *birth* of a son, and all the religious ceremonies put together are not equal in a spiritual point of view to the sixteenth part of the efficacy of the birth of an eldest son.[4] The begotten son is further represented as the father's own self reproduced in the shape of a son. Thus a passage of the Veda says:—"Thou art sprung from every limb; thou art produced from the heart; thou art indeed my own self denominated son: may thou live an hundred autumns."[5] So Manu says: "The son of a man is even himself." And he further declares,—The husband becomes himself an embryo in the womb of his wife and is born a second time here below: the wife is therefore called genetrix (*jáyá*) because by her he is born again.[6] And Ápastamba is not satisfied by relying on the authority of the revelation alone to establish the identity of a father and a son, but he also invokes the profane authority of perception, thus,—Now it can also be perceived by the senses that the father is reproduced in the son; for their likeness is even visible, only their bodies are different. With a view to improve the condition of the real legitimate sons, the sages gave prominence to these ideas which were calculated to produce a moral check to the arbitrary and capricious exercise by a father of his power own his sons.

Having set forth the new ideas of sonship, likely to induce fathers to be kindly and favourably disposed towards the begotten sons, the Hindu lawgivers did with a view to further strengthen their position, discourage adoption by men having real legitimate sons in existence. Thus Atri says that

[1] Vrihaspati, 1 Dig. p. 228 (Madras Edition). [2] XVII, 1 and 2. [3] Manu IX, 1
[4] Sankha and Likhita cited in Dáyabhága XI, I, 31. [5] Dat. Mim. VII, 7. [6] Manu IX, 8

substitute of a son should be made only by a sonless man in any of the modes of adoption, for the sake of the funeral cake, the libation of water, and the exequial rites.[1] So a passage attributed to Manu declares that a son should be adopted by a man destitute of male issue, in any one of the modes, for the sake of the funeral cake, the libations and exequial rites, as well as for the celebrity of his name.[2] These passages are intended to disapprove of an adoption by a person having a primary son in existence. It should be observed that these texts do not refer to secondary sons by operation of law.

The above passages of Atri and Manu referring to the performance of religious rites, as the reason for adoption show that the sons by adoption, also are capable of conferring spiritual benefit by performing those ceremonies. So Manu in another passage declares,—Sages pronounce these eleven sons beginning with the appointed wife's son, as described above, to be substitutes of the real legitimate son, for the sake of preventing the failure of obsequies.[3]

But Manu appears to be inconsistent on the subject of the capacity of secondary sons to confer spiritual benefit. For, although in the above text he appears to declare them competent to perform the exequial rites, he goes on to imply that they are of no spiritual benefit whatever to their legal fathers, thus,—"Though in dealing with the subject of sons, those produced from the manhood of others have been enumerated in the category of sons, they belong in truth to their progenitor and to no other.[4] Again while commencing the subject of sonship, he observes, "They consider the male issue of a woman as the son of her lord; but on the subject of that lord a two-fold revelation is mentioned: one giving that name to the real procreator of the child, and the other applying it to the married possessor of the woman.[5]" These two texts taken together show the author's own opinion to be in favour of the former view. In another passage the sage clearly intimates the vanity of the desire to secure spiritual benefit by means of subsidiary sons, in these words:—"Such advantage as a man would gain who should attempt to pass deep water in a raft made of woven reeds, that father obtains who seeks to pass the gloom of death, leaving only contemptible, (*i. e.*, substitutionary) sons."[6]

So Baudhâyana having described thirteen kinds of sons, and their right of inheritance and competency for performing the Sráddha ceremonies, concludes the subject of sonship by quoting a conversation showing the spiritual inefficacy of sons begotten by other men, thus:—"Aupajandhani said, among these different kinds of sons the real legitimate son alone is entitled to inherit; now, O Janaka! I jealously watch my wives, though I did not do it formerly; for they declare it revealed that in the court of the god of death a son is regarded as belonging

[1] Dat. Mim. I, 3. [2] Dat. Mim. I, 9. [3] IX, 180; Dat. Mim. I, 33.
[4] Manu IX, 181. [5] Manu IX, 32. [6] Manu IX, 161.

to the begetter: the owner of the seed carries off the spiritual benefit derived from a son, after death in the hall of the god that dispenses rewards and punishments to souls of deceased men. Therefore, they carefully protect their wives, fearing the birth of a son from the seed of strangers: carefully watch the procreation of your offspring lest strange seed falls on your soil. After death the son belongs to the begetter; through carelessness a husband makes the procreation of a son useless."[1]

Likewise Vasishtha introduces the subject of sonship with passages extolling the spiritual capacity of a begotten son, and then adds the following observations:—There is a dispute among the wise; some say, that a son belongs to his mother's husband, while others say, that he belongs to the begetter. With respect to this, they quote also on both sides verses of revelation like the following: (one side cites) "If one man's bull were to beget a hundred calves on another man's cows, they would belong to the owner of the cows; in vain would the bull have spent his strength": while others quote "Carefully watch the procreation of your offspring, lest strangers sow seed on your soil; in the next world the son belongs to the begetter; by carelessness a husband makes the possession of offspring in vain."[2]

Ápastamba's views are entirely against the usage of secondary sons, who are not even described by him. He defines the real legitimate son, and then declares it sinful for a man to approach a woman who had been married before, or was not legally married to him, and so the sage intimates it sinful to have a son by a twice-married woman. He next proceeds to establish the uselessness of having sons by an appointed or adulterous wife or daughter, by citing a text of the Bráhmana and a verse from the Vedas declaring that a son belongs to the begetter in the next world. He then goes on to say that the ancient practice of having secondary sons being opposed to religious duty should not be followed. And lastly, he says that the gift or sale of a son is not recognized,[3] evidently with a view to disapprove of the sons by adoption. In another part of his work he refers to the appointment of the wife to raise issue, and lays down a restriction in respect of it, which I have already mentioned, but he censures the custom as sinful by reason of the transgression of the marriage vow, and concludes thus,—The reward in the next world resulting from observing the restrictions imposed by law is preferable to offspring obtained in this manner (by means of *niyoga*).[4] Thus he condemns the ancient usage relating to the secondary sons entirely on religious grounds, but it must not be supposed from

[1] Baudhayana II, 2, 3, 33—35;—XIV Sacred Books of the East, p. 229.
[2] Vasishtha XVII, 8—9;—XIV Sacred Books of the East, p. 84.
[3] Ápastamba II, 6, 13;—II Sacred Books of the East, pp. 129—131.
[4] Ápastamba II, 10, 27, 1—7;—II Sacred Books of the East, p. 164.

his omission to describe the subsidiary sons and his condemnation of the usage, that it was not in full force in his time; since the manner of his writing proves that it did exist, but was felt to be a great evil, and sought to be removed by means of the influence of religion.

There cannot be any doubt left on the mind of a reader after perusing the above passages, that the doctrine of spiritual benefit, instead of being the foundation of the institution of subsidiary sons, was on the contrary invoked for the very purpose of suppressing it by declaring these sons to be useless to their temporal fathers in a spiritual point of view. Ten out of the twelve descriptions of sons are begotten by others, and their natural, and not the legal, fathers are represented to reap the spiritual benefit that can be derived from a son. These somewhat contradictory passages, no doubt, render the Hindu sages liable to the accusation of being inconsistent. But we must bear in mind the actual state of Hindu society as disclosed by these texts, at the time when the lawgivers flourished, as well as the difficulty of social reformation, in order to rightly understand and appreciate the course of policy adopted by them. The abject condition of sons, and the revolting practices upon which the institution of subsidiary sons was founded, were the two great evils, for which the sages set themselves to provide a remedy. The ancient practices relating to sonship were deep-rooted and wide-spread in Hindu society, and could not be suppressed at once. The twelve descriptions of sons, therefore, could not but be recognized by the sages, but at the same time an altogether different direction was given to the hankering after sons by introducing and thrusting into prominence the doctrine of spiritual benefit derived from a son. The real legitimate son, however, is pronounced in unambiguous language, to be competent to render spiritual service to his father. But as regards the capacity of the subsidiary sons there are a few texts couched in dubious words expressing their competence to perform the exequial rites which may or may not be conducive to the celestial bliss of their legal fathers. The objects, the sages had in view were to discourage and suppress the institution of subsidiary sons, and at the same time to ameliorate the condition of such sons who existed and must continue to exist until gradually suppressed under the influence of the new ideas promulgated by the Codes.

The existence of the custom of adoption amongst the Jainas and other Hindu dissenters who have not adopted the Brahmanical view of the importance of sons for spiritual purposes, and do not perform the Srâddha ceremonies that form the f ndation of the spiritual benefit conferred by sons, proves beyond all doubt t t the usage of adoption did not owe its origin to the religious belief that a s is necessary for the salvation of man.

The doctrine of spiritual benefit derivable from real legitimate sons was t › chief instrument by means of which the Hindu lawgivers sought to effect

social reforms. They invoked the aid of that principle for the purpose of improving the institution of marriage, the prevalent forms of which were most reprehensible. They describe eight forms of marriage, but they condemn those that are repugnant to refined feelings and cultivated minds, and declare the issue of such marriages to be far less competent to confer spiritual benefits than the offspring of the approved forms. Manu and Baudháyana declare that the quality of the offspring depends on the quality of the marriage rites.[1] And Manu[2] and Yájnavalkya[3] say that a son born of a wife married in the Bráhma form redeems from sin, by means of religious acts performed by him, ten ancestors, ten descendants and himself; a son born of a wife by Daiva marriage redeems seven generations in the higher and seven in the lower degrees; one begotten on a wife espoused in the Prájápatya form, six generations in the ascending and six in the descending line; and in the Árṣha form, three ancestors and three descendants. The Árṣha form in which a bull and a cow were presented to the bride's father appears to have been a traditional relic of an ancient practice according to which the bride's price consisted in a certain number of cattle; and the bull and cow given, were looked upon more as customary presents than as the bride's price. Manu appears to view it in that light, and declares that if they are accepted by the father as the bride's price, he becomes guilty of the sin of selling a child.[4]

The remaining four forms of marriage, namely, the Ásura, Rákshasa, Gándharva and Paisácha are disapproved and condemned by the Rishis, and the issue of these marriages are declared to become devoid of intellectual and moral perfection.[5] Of these forms the three last were exceptional and rare: the marriage by capture is not probable in a settled state of society, and might be then possible only in the case of the reigning princes of the small states into which India was divided; while the Gándharva and the Paisácha were recognized by the lawgivers as forms of marriage, rather with a view to preserve the chastity of the damsels concerned, than to declare them lawful ways of forming marriage union. But the purer form alone of the Gándharva marriage appears to be recognized by the sages, and is not quite disapproved, but declared lawful for the warrior class only.[6] The Ásura, however was, as I have already told you, the most prevalent form of marriage in early times, the characteristic of which is the extreme selfishness of the bride's father or other relation, who, in disposing of her in marriage is influenced by no other consideration than the amount of the bride's price, and sell her to the highest bidder. The Rishis condemn this reprehensible practice on spiritual grounds: one who, through avarice, takes a gratuity, however small, for giving his daughter in marriage,

[1] Manu III, 42; Baudháyana, XIV Sacred Books of the East, p. 207.
[2] Manu III, 37 and 38. [3] Yájnavalkya I, 58 and 59. [4] Manu III, 53.
[5] Manu III, 41. [6] Manu III, 24.

declared to be a seller of his offspring,[1] that is to say, guilty of a sin of the third degree.[2] Baudháyana[3] disapproves of it in these words :—Now they quote also the following verse,—'It is declared that a female who has been purchased for money is not a *patní* or lawful wife; she cannot associate at sacrifices in honour of gods or ancestors; the sages pronounce her a female slave.' You will observe that the purport of this passage is that a son begotten on such a wife cannot be an *aurasa* son, and therefore cannot be useful in a spiritual point of view.

I may here remark in passing that with a view to induce people to contract marriages in the approved forms, the sages declare that the *stridhana* of a woman dying without leaving any issue of her body passes to the husband, if she was espoused in the approved forms; but to her relations, if her marriage took place in a reprehended form.

We have already considered what the nature of the union between the sexes was in early times; such unions can hardly be called marriages. The rishis taught a higher conception of marriage and impressed a sacred character on the connubial tie, and in doing so, they relied upon the theory of the importance of a son for spiritual purposes. It is not for the gratification of the senses that marriage is to be contracted, but it is considered a sacrament necessary for the spiritual development of man. A man is enjoined to enter into the married life for the purpose of having a son, and a wife is represented to be an indispensable associate for the performance of religious ceremonies. In early times, women anyhow brought under the control of a man, became his wives; but a distinction appears to have naturally grown up amongst them; some were called *patní* and the rest were expressed by words that mean either a wife or a concubine or a woman under the protection of a man. The master of the house was called the *griha-pati* and the mistress of the house seems to have been designated the *griha-patní* or shortly the *patní*. The most favourite and trusted wife, or one who was the daughter of an influential man, was likely to hold that position. The word *patní*, which originally signified a wife holding the highest rank in the family, came to be understood in a different sense, and was employed to designate wives espoused in the approved forms of marriage. Its etymology also was made consistent with the religious principle upon which the Rishis based the marriage union. Thus Pánini,[4] the most authoritative grammarian of the Sanskrit language, says, that the word *patní* or wife is derived from the word *pati* ( husband (literally protector) and implies connection with sacrifices, so that ' participates in the fruits of the religious ceremonies performed by him. ' ıe *patní* or wife, according to the rishis, is a partner not only in this life but

[1] Manu, III, 51.

[2] Manu, XI, 62 and 67.

[3] XIV, Sacred Books of the East, p. 207.

[4] Pánini, 4. 1. 35.

also in the next world. The union between a husband and a wife is not a connection for secular purposes alone, but it is a sacred tie that subsists in the next world and is not severed by the death of either of them.

The division of the wives of a man into those that are *patnís* and those that are not so, and the exposition of the principles of this classification, given by the commentators throw considerable light on the character of the legislation of the rishis, and the policy pursued by them. It has also an important bearing on the definition of an *aurasa* son. The distinction between *patnis* and non-*patnis* is considered by the commentaries while dealing with the subject of the widow's succession to the husband's estate. Thus, the Dáyabhaga[1] cites a number of conflicting texts, some of which give the first place to the widow in the order of succession to the estate of a person dying without leaving any male issue, while others either do not at all recognize her heritable right or assign to her an inferior position; and reconciles them by dividing the wives into *patnís* and non-*patnís*:[2] of these the former, are held entitled to inherit, and the latter only to maintenance but not to heritage. The author, however, does not furnish us with the principle upon which the distinction taken by him is based, nor does he tell us what constitutes a *patní*. From what is remarked by him in the preceding passage of his book, it appears that a wife of the same caste with the husband is, and in her default one belonging to the next inferior caste becomes, a *patní;* but a wife that belongs to a still lower tribe is not and cannot be a *patni*. Thus he points to the caste as one ground of distinction.

The Mitáksharâ[3] and the Víramitrodaya[4] define *patní* to be a wife married in lawful wedlock implying connection with religious rites; and they rely upon Páníní's aphorism in support of this definition. The Víramitrodaya goes on and cites the text of Baudháyana declaring that a wife married in the Ásura form does not become a *patní* and is not entitled to associate with the husband in performing religious rites; and the conclusion deduced by the author from this text is, that wives married in the disapproved forms of marriage cannot inherit in competition with a *patní* or a wife married in the Bráhma or other approved form.[5] The author of the Smriti-Chandriká entertains a similar view, and observes that a wife espoused in the Ásura or the like culpable form is not a *patní* and is not entitled to inherit her husband's estate.[6]

In order that a married woman may be a *patní*, it is further necessary that she should be a virgin at the time of her marriage; but if she was defiled by intercourse with a man before marriage, she becomes, on being espoused a *punarbhu* or twice-married woman, and cannot therefore attain the rank of a *patní*. Thus Yájnavalkya enjoins a man to marry a damsel who is *an-anya-purvikám*, *i. e.*,

[1] Ch. XI, Sect. 1. [2] Ch. XI, Section 1, para. 48. [3] Ch. II, Sect. 1, para. 5.
[4] Translation, p. 132 [5] Translation, p. 132. [6] Widow's Succession.

not defiled by connection with man:[1] later on he explains what (*anya-púrvám*) 'defiled by connection with man' means, in these words,—"A girl remarried, though her first marriage was not consummated, as well as a girl deflowered before marriage, are called *Punarbhú* or twice-married; and a woman who leaving her husband goes over to another man through lust is called a *svairiní*."[2] The Mitákshará explains this passage thus, "*Anya-púrva* or 'defiled by connection with man' is of two kinds, namely, *Punarbhú* and *Svairiní*. *Punarbhú* again is of two descriptions, namely, deflowered and unde-flowered. Of these the deflowered is one defiled by intercourse with man; and undeflowered is one defiled by a previous marriage ceremony, though she be a virgin." Similarly Vasishtha declares,—"A man should espouse a girl of the same caste, who is younger in age, and who has not been defiled by intercourse with man." It may no doubt seem from the expressions *anya-purva* and *para-purva* used by the sages and the commentators, which may be rendered into 'having connection with another man or a stranger,' that a woman on her marriage becomes *punarbhú* or twice-married, if she has previously to her marriage been seduced by a man other than the husband; but that if the seducer himself espouses her, she does not come under the category of *punarbhú*. This distinction, however, does not appear to be recognised by the *rishis*, and in fact it would be opposed to the policy of their legislation. For Nárada ordains that a man defiling an unmarried girl who has not attained puberty should be punished with the cutting off of his two fingers, or with death and confiscation of his entire property if she belongs to a superior caste; but one having intercourse with a damsel who was forward through lust, must marry her by giving her ornaments.[3] So Sankha and Likhita declare that if the caste be the same, the seducer must espouse the deflowered damsel on payment of double the bride's price and ornaments.[4] Likewise Manu says that the seducer of a girl, must, if her father consents, give the bride's price, and adds Kulluka Bhatta, marry her.[5] The author of the Vivádа-Ratnákara, after citing these texts observes, that the seducer should espouse her as in the Ásura form by giving double *stridhana* to the damsel, and twice the bride's price to her relations.[6] This shows that the marriage of such a girl cannot take place in any of the approved forms, for in them a virgin is given by the father or any other relation to the bridegroom for the purpose of making her his wife. Such a gift is impossible in a case where the damsel has already made a gift of herself and ceased to be a

[1] Yájnavalkya, I, 52.

[2] Yájnavalkya, I, 67.

[3] Nárada-Smriti, Twelfth Topic, verses 71 and 72, Asiatic Society's Edition, p. 182.

[4] Cited in Vivádа-Ratnákara, Asiatic Society's Sanskrit Edition, p. 402.

[5] Manu, VIII, 366.

[6] Asiatic Society's Sanskrit Edition, p. 403.

virgin.[1] The only form in which she could be the wife of her seducer is similar to the Ásura-form in which the bride is purchased; but it must be inferior even to the Ásura form. It appears, therefore, to be the view of the sages that a married woman in order to be ranked as *patní* must be a virgin at the time of her marriage. Manu appears to express the same view in another connection, thus, —"In all castes they and they only who are born, in direct order, of *patnís* equal in class and *virgins at the time of marriage* are to be considered as the same in caste with their fathers."[2]

From what has already been said it appears that in order that a married woman may be a *patní* it is also necessary that she was not previously married by another man. The mere circumstance of a woman passing through the marriage ceremony or even a part of it constitutes her a *punarbhú* or twice-married woman, although the marriage was not or could not be consummated. Thus Baudháyana cited in the Parásara-Mádhava,[3] says:—"*Punarbhús* or twice-married women are of seven descriptions, namely, one verbally betrothed, one mentally betrothed, one given before the nuptial fire, one who has passed through the seven steps, one whose marriage has been consummated, one who has conceived, and one who has given birth to a child: espousing such a woman, a man neither gets issue nor gains the religious object." It may appear unreasonable to include in the category of *punarbhú*, damsels who are merely betrothed, and those whose marriage is not consummated. But it should be observed that the ideal which the rishis introduced and approved of was, that a woman should not have or think of having, one husband after another: they recognized the *paunarbhava* son, and the re-marriage of women, but they recommended single-husbandedness for women as the most virtuous course for them to adopt, which secures them the most blissful regions in the next world. Thus Manu declares the duties of women, conducive to their spiritual benefit:—"Him, to whom her father has given her, or her brother with the father's assent, let her dutifully serve, while he lives; and, when he dies, let her never become unfaithful to him. Though inobservant of approved usages or attached to another woman, or devoid of good qualities, yet a husband must constantly be revered as a god by a chaste wife. Neither sacrifice, nor religious rite, nor fasting is allowed to women apart from their husbands; it is only by faithfully serving her lord that she attains happiness in heaven. A faithful wife who wishes to attain in heaven the mansion of her husband, must not do anything disagreeable to him, be he living or dead: let her emaciate her body, by livi voluntarily on pure flowers, roots, and fruit; but let her not, when her lord deceased, even pronounce the name of another man: let her continue till dea

[1] See Colebrooke's note to Mitákshará 1, 11, 19.

[2] Manu, X, 5.

[3] Asiatic Society's Edition, p. 4(

forgiving all injuries, avoiding every sensual pleasure, practising austerities and longing for that incomparable religious merit attained by such women as are devoted to a single husband. Many thousands of Bráhmanas who were lifelong students, observing celibacy, have ascended to heaven without leaving issue in their families; like these life-long students a chaste widow, leading a life of austerities after the death of her husband ascends to heaven, though she leave no son: but a widow, who, from a wish to bear children becomes unfaithful to her deceased lord (by marrying again,) brings disgrace on herself here below, and shall be excluded from her husband's mansion in heaven."[1] What was thus recommended by Manu and other rishis has gradually been adopted by Hindu society, and the re-marriage of widows has become exceptional and confined to the lowest classes, notwithstanding the passing of an Enactment legalizing their marriage. It is very difficult to pronounce an opinion upon the utility or otherwise of this custom of Hindu society; all social problems are most complicated and admit of no easy solution. Apart from its salutary effects on society, the custom discouraging the remarriage of widows, seems most equitable to the fair sex, for according to it every one of them is once provided with a husband, and none of them die a spinster at an old age; and the form which the widow-marriage controversy assumes is one between widows and grown up spinsters, the number of females being larger than that of males.

The looseness of the marriage union and the laxity of the sexual morality, that prevailed in early times were the evils which the rishis endeavoured to suppress. They imparted a sacred character to marriage, which is according to them the last of the sacraments for the twice-born men and the only one for the Sudras and women; and they prescribed elaborate religious ceremonies for effecting a marriage union, which are calculated to make an indelible impression upon the mind as to the importance, solemnity and indissolubility of the nuptial tie. They set a very high value on female chastity, and there cannot be any doubt that the happiness of home entirely depends upon it. Even in modern jurisprudence the wife's faithfulness to the husband is valued more than the husband's fidelity towards the wife. The legitimacy of the issue is the reason why a wife is required to be strictly faithful to the husband, while the reciprocal duty is not required of the husband. On this subject Manu declares:—"Let husbands, how weak soever, diligently keep their wives under lawful restrictions; for he who preserves his wife from vice, preserves his offspring from suspicion of bastardy, h[illegible] ancient usages from neglect, his family from extinction, himself from be[illegible] deprived of heavenly happiness, and his religious duty from violation."[2] T[illegible] strict fidelity of a wife to a polygamous husband may appear to be one-s[illegible] ed and wanting in the foundation of mutuality. But it should be noticed

[1] Manu, V, 151 154—161.

[2] Manu, IX, 6 and 7.

that the rishis do not approve of unrestricted polygamy, and they permit men to take a second wife in the lifetime of the first only under special circumstances. Thus Manu says:—"A wife, who drinks any spirituous liquors, who acts immorally, who shows hatred to her lord, who is incurably diseased, who is mischievous, who wastes his property, may at all times be superseded by another wife. A barren wife may be superseded by another in the eighth year; she who brings forth still-born children or whose children all die infants, in the tenth; she, who brings forth only daughters, in the eleventh; and she, who speaks unkindly, without delay."[1] It is therefore incorrect to suppose that the Codes of Hindu law permit a man to espouse a second wife when the first is existing, except under particular circumstances. Manu appears to present the perfect ideal of conjugal fidelity by requiring both the husband and wife to be faithful to each other. Thus in concluding the subject of mutual duties of husband and wife the sage ordains:—"Let mutual fidelity continue to death: this, in few words, may be considered as the supreme law between husband and wife; let a man and a woman united by marriage, constantly beware lest at any time being disunited they violate their mutual fidelity."[2] This passage clearly implies monogamy to be the essential condition of the supreme law of conjugal duties. But it should be observed that the sages did not prohibit polygamy which was prevalent at the time, but the tendency of their legislation was to discourage that practice by investing the marriage union with a religious character, and by permitting the marriage for religious purposes of a second wife in the lifetime of the first, only in certain contingencies when there was a failure of the object of marriage. Those, however, that were impelled by inclination are declared to be at liberty to marry again a woman of a lower class,[3] who becomes a wife for secular purposes only, and cannot ordinarily be a *patní*.

With a view to secure the chastity of females and to prevent the possibility of a damsel's falling into error before marriage, the rishis introduced early marriage of girls by making it a religious duty on the part of a father to provide his daughter with a suitable husband before her puberty. On this subject, Manu declares,—"Reprehensible is the father who gives not his daughter in marriage at the proper time;"[4] and it is ordained by other sages that should a girl arrive at puberty and be not disposed of in marriage, her father and grandsires fall into a region of torment in the next world. Thus Paithínasi says:—"A daughter should be given in marriage before her breasts swell. But if signs of puberty appear before marriage, both the giver and the taker [illegible] into the abyss of hell; and her father, grandfather and great-grandfather [illegible]

[1] Manu, IX, 80-81.
[2] Manu, IX, 101 and 102; see also V, 167 and 168.
[3] Manu, III, 12.
[4] Manu, IX, 4.

born insects in ordure; therefore she should be given in marriage while she is yet a girl."[1] The better classes of the Hindu community strictly comply with the direction contained in this passage for the purpose of securing themselves and their ancestors against the torments of the infernal regions; although the most authoritative of the sages qualifies the rule thus:—"To an excellent and handsome youth of the same class, let every man give his daughter in marriage, according to law; even though she have not attained the nubile age (of eight years;) but it is better, that a damsel, even after the signs of puberty have appeared, should stay at home till her death, than that he should ever give her in marriage to a bridegroom void of excellent qualities."[2] The *kulín* Bráhmanas, however, proud of their fanciful distinctions, are the only class of Hindus that rely upon the letter of this rule to support their vicious custom of not giving their daughters in marriage should a *kulín* bridegroom be not available; but they do not pause to think that they are setting their foot on the spirit of the law propounded by Manu.

You will observe that these ordinances of the rishis relating to marriage, sonship, chastity and single-husbandedness are all recommendatory in character; for the sages did at the same time recognize the validity of the existing customs and usages which though at variance with the higher notions approved by them, were deep-rooted and widespread in Hindu society. But it should be specially noticed that Hindu society has adopted these rules of conduct, approved by the sages, although there was no legal sanction or pressure imposed upon it. And before considering the effect of these rules upon sonship, I may make a few observations as to the way in which these improvements appear to have been brought about. The civilization of Hindu society appears to be due, to a very great extent, to the caste-system introduced by the rishis. The caste holding the foremost rank in Hindu society was composed of the priestly class, in other words, of the families that were educated, versed in the scriptures and therefore competent to teach religious truths and to officiate at the sacrifices performed to propitiate the deities. The rishis or the learned and thinking sages of the early Hindu society, were not satisfied simply by laying down rules designed to remedy the social evils, but they devised practical means for the adoption of the rules approved by them. The caste system at its inception was based on a division of men into four classes according to their intellectual, moral and physical qualities. The intellectual and the moral excellence was the distinctive feature of the sacerdotal class; and the rishis who wrote for the guidance of their own class require of its members the strictest observance of the ordinances in order to maintain their own superiority. The gross and immoral usages abhorrent to cultivated minds are censured by the rishis as being

[1] Dáyabhága, XI, II, 6.

[2] Manu, IX, 88 and 89.

fit for the lower castes or for brutes: thus the disapproved forms of marriage are generally censured, and pronounced to be fit, if at all, for Kshatriyas, Vaisyas or Sudras,[1] thereby intimating that it is inconsistent, with the purity which should characterize a Bráhmana, to contract marriage in these forms; and the appointment to raise issue on a woman is reprehended by Manu as being a practice fit only for cattle.[2] The Brahmanical class were the first to adopt the rules laid down by the sages, and to put their precepts into practice. And their superiority which owed its orgin to their learning was augmented and maintained by the purity, sanctity and simplicity of their lives, their austere self-denying and ascetic habits, and above all their devotion to religion. And it was not so much by the precepts embodied in the Codes which were inaccessible to the mass of the people, as by the noble example of the sacerdotal class that the civilization of Hindu society was achieved. And it is worthy of notice that although the rishis while censuring the early practices drew a distinction and pronounced some of them to be lawful for the lower castes in order to induce the Bráhmanas to avoid them as being unsuitable to the superior position reserved for them, we find that even the better classes of Sudras have adopted, amongst other purer rules, the Bráhma form of marriage, while there are several sections of the Bráhmanical class, amongst whom marriages now take place in the Ásura form which is censured by the sages and declared by them to be lawful for Vaisyas and Sudras alone. It would be betraying an ignorance of the actual state of modern Hindu society to suppose that the different castes are at the present day, what they are depicted by the Codes to have been thousands of years before.

You will observe that the foregoing rules based upon high principles of morality and designed to elevate the position of women and real legitimate sons were all calculated to discourage the usage of having subsidiary sons by operation of law, that is to say, those secondary sons that owed their origin to the unchastity of wives and unmarried daughters. The institution of early marriage had the effect of suppressing the Kánína or the damsel's son and the Sahodhhaja or the son of the pregnant bride; while the precepts relating to the purity of marriage union and sexual morality and to the uselessness of subsidiary sons in a spiritual point of view could not but be attended with the result of the Kshetraja and the Gúdhaja sons being looked upon with contempt. All these rules are backed by the religious sanction alone, and the doctrine of spiritual benefit derived from a real legitimate son appears to be the keystone supporting the body of these rules laid down for the purpose of purifying the family relation.

The division of a man's wives into *patnís* and non-*patnís* has an impor. it

[1] Manu, III, 23 and 24.

[2] Manu, IX, 66.

bearing on the definition of an *aurasa* or real legitimate son. Yájnavalkya describes an *aurasa* son to be one begotten on a lawfully wedded *patní*;[1] Manu,[2] Vasishtha[3] and Devala[4] define an *aurasa* son to be one procreated by a man himself on his wife wedded with religious rites; while Ápastamba[5] and Baudháyana[6] appear to require that the wife should belong to the same caste with the husband and be espoused with religious rites in order that a son begotten on her may be an *aurasa* son. Taking all these definitions together, an *aurasa* son appears to be one begotten by a man on a wife of the same caste, who was espoused in an approved form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. But this definition must be regarded as one relating to an *aurasa* son that is approved by the rishis as being the most perfect of his kind. There cannot be any doubt, however, that a son begotten by a man on his wife, who belongs to an inferior tribe, or who is espoused in a reprehensible form of marriage, is also an *aurasa* son, although he may be of an inferior quality on spiritual grounds: he must come under one or other of the twelve descriptions of sons, and as he cannot be comprised by any other kinds, he is to be included under the *aurasa* class; for Vishnu says: "There are twelve kinds of sons, of these the first is one begotten by a man himself on his own wife." I have already cited a text of Baudháyana, which characterizes a wife espoused in the Ásura form as becoming a female slave of the husband; and Atri declares,—"A damsel who is purchased by price is not ordained to be a *patní*; sons born of her cannot present *pinda* to their father."[7] Referring to these passages of the Smritis, the Kálikápurána says that a son born of a wife purchased by price is called a slave-son and is incompetent to offer the funeral repast.[8] Similarly a son of a wife belonging to an inferior tribe is declared incapable of performing the religious rites conducive to the spiritual benefit of his father.[9] The conclusion therefore which appears to follow is that a son born of a wife belonging to an inferior tribe, or espoused in a disapproved form of marriage is an *aurasa* son for secular purposes, though he be worthless in a spiritual point of view. The secular purposes served by a son are the perpetuation of the lineage and the celebration of the father's name.

[1] Yájnavalkya, II, 128.
[2] Manu, IX, 166.
[3] Vasishtha, XVII, 13.
[4] Devala cited in Vivádа-Ratnákara, Asiatic Society's Sanskrit Edition, p. 554.
[5] Ápastamba, II, 5, 13, 1—2.
[6] Baudháyana, II, 2, 3, 12—14.
[7] Atri-Smriti, Jíbananda Bhattacharya's Edition of Smritis, Vol. I, page 45.
[8] See Dattaka-Mímánsá, IV, 75-78.
[9] Dattaka-Chandriká, I, 14.

The division of *aurasa* sons into those that are beneficial in a spiritual sense and those that are not so, is worthy of special notice, as the *aurasa* son occupies the foremost rank in the classification of the different descriptions of sons, made by the rishis. If therefore even some of the *aurasa* sons be useless for religious purposes, it follows *a fortiori* that the other descriptions of sons, who are inferior to the *aurasa* son are far less competent to confer spiritual benefits on their fathers.

The policy of the rishis being to discourage the usages relating to the affiliation of the subsidiary sons, they appear to have introduced for the first time the distinction between the real legitimate son on the one hand and the subsidiary, secondary or substitutionary sons on the other. It appears that the word *putra* did in early times signify any description of sons; it denoted the particular status of one person in relation to another. And I have already observed that in early times, there was no inherent superiority of any one description of sons over another, the father's choice determined the position and rank of a son in the family. In enumerating the twelve descriptions of sons, all the sages concur in giving the first place to the *aurasa* son, and in thereby intimating his inherent superiority over all other kinds of sons. But Manu expressly declares that the eleven descriptions of sons, beginning with the Kshetraja or the appointed wife's son, as have been described above, are declared *substitutes* of *putra* or son, so that there may not be a failure of the exequial ceremonies.[1] It follows, by necessary implication, from this passage that the word *putra* primarily signifies the *aurasa* son, and that the other descriptions of sons are his substitutes and are *putras* in a secondary sense. This is also intimated by Atri, when he says,—"By an *a-putra* or a sonless man alone should a substitute of *putra* or son be always made."[2] This text clearly implies that the term *putra* means the real legitimate son, and the other kinds of sons are his substitutes. Accordingly it appears that an *aurasa* son is to be taken as the primary meaning of the word *putra*, and that it imports any other kind of son in a secondary or figurative sense. Therefore in interpreting a passage of the Smritis or the Codes which fix this distinction in its meanings, the word *putra* is to be understood, in the absence of anything in the passage to the contrary, to mean a real legitimate son, agreeably to a well-known rule of construction, which says that a word in a rule of law is to be taken in its primary sense.[3] Accordingly the author of the *Dattaka-Mímánsá* in construing a passage of law observes that the word *putra* used in it must be taken in the primary sense of a real legitimate son.[4]

Thus the rishis did by means of the doctrine of spiritual benefit endeavour to raise the position of a real legitimate son, and draw a wide line of distinction

[1] Manu, IX, 180.
[2] Dattaka-Mímánsá, i, 3.
[3] Dattaka-Mímánsá, VI, 28.
[4] Dattaka-Mímánsá, II, 40.

between him and the rest. And having assigned the superior position to the *aurasa* son they go on to declare that he alone is entitled to become the master of the paternal wealth, but out of kindness to the rest he should provide them with maintenance.[1]

But all these rules of the Codes, relating to the superiority of the real legitimate son, appear to be innovations and recommendatory in character, for side by side with these precepts we find other passages in the Codes, which are inconsistent with the former, and therefore appear to embody the existing customs, according to which the twelve descriptions of sons are divided into two groups of six each, and the *aurasa* son is only one of the six included in the first group though occupying the foremost place in the enumeration. This division of the divers kinds of sons into two groups or sets, each consisting of six descriptions of sons appears to have prevailed from before the time when the Codes were composed.[2] Many of the Codes adopt this division and declare that the first six are *dáyádas* as well as *bandhus* or heirs and kinsmen, and the second six are only *bandhus* or kinsmen but not *dáyádas* or heirs.

The word *dáyáda* ordinarily rendered into 'heir,' appears to be used in the Codes in the sense of a coparcener or one who is entitled to take an interest in the family property or one who takes by survivorship the undivided coparcenary interest of another member in the joint estate of the family.[3] The Mitákshará, however, explains the word *dáyáda* used in these passages to mean an heir to the father's *sagotra* relations;[4] and supports the explanation by affirming that the word is frequently used to signify an heir other than a son.[5] And the term *bandhu* in the passages relating to this subject is employed in the sense of *sagotra* or member of the *gotra* or family of the legal father.[6] The word *bandhu*, which is derived from the root *bandh* to bind and seems to be philologically the same as the English word 'bind,' means one who is bound or tied to another; and as in ancient society the *gotra* relationship or the tribal connection was the strongest tie that bound human beings together, it signified an agnate or member of the same *gotra*. Yájnavalkya, however, uses this word in the sense of a cognate or one related through a female, while he uses the word *gotraja* to designate an agnate or a member of the same *gotra*.[7]

Some of the sages, however, do not divide the sons into two groups of six;

[1] Manu, IX, 163; Baudháyana, II, 2, 3, 33—Sacred Books of the East, Vol. XIV, 229.

[2] Kathopanishad Asiatic Society's Sanskrit Edition, page 77.

[3] Víramitradaya Translation, page 140.

[4] Colebrooke's Mitákshará, 1, 11, 31.

[5] *Ibid* 1, 11, 33; see also Víramitrodaya, page 126.

[6] See Mitákshará original corresponding to Colebrooke's Translation, 1, 11, 31, last sentence.

[7] Yájnavalkya ii, 136—137; Mitákshará, 2, 1, 2.

but they describe them in a certain order and declare their relative position and importance to be in accordance with the order of their enumeration.

The two groups or sets of sons, into which the different descriptions of sons are divided by the majority of the sages, do not, however, each of them consist of the same descriptions of sons in the different Codes. Some kinds of sons that are placed in the first group by one sage are included by another in the second group. But it is to be observed that all the sages agree in declaring the sons to be of unequal rank and in placing the real legitimate son at the top of the list, although some of them have not adopted the division of sons into two groups. But as regards the relative position and rank of the secondary sons amongst themselves there appears to be considerable divergence of opinion among the sages. This difference may be attributed either to the successive stages of development or to the existence of different Schools of law or usage on the subject.

You will observe that, of the different kinds of sons some are begotten by the father himself on his own wife, some are born of his daughter or of his wife, and the rest are affiliated by adoption. The majority of the sages place the five sons by adoption in the second group who are declared to become simply *bandhus* or members of the *gotra* but not heirs; and with them is classed the *paunarbhava* or son of the twice-married woman by Nárada, and Sahodhaja or the son of a pregnant bride by Vishnu, Yama, Vasishtha, Hárita, Sankha and Likhita, and Yájnavalkya, to make up the number six of the second group. And all these sages and Devala agree in including under the first set the real legitimate son, the appointed wife's son, the appointed daughter's son, the damsel's son and the secretly born son of an adulterous wife; but the son of a twice-married woman is placed with them in the first group by all these sages except Devala and Nárada who place him in the second group, and include the deserted son and the son of a pregnant bride respectively in the first; whilst the other rishis named above place the latter in the second group and the *paunarbhava* in the first. This division appears to be the earliest and indicates the first stage of a distinction drawn between the sons.

Thus, Vishnu describes the sons in the following order:—The real legitimate son, the son of the appointed wife, the son of the appointed daughter, the son of the twice-married woman, the son of an unmarried daughter, the secretly born son of an adulterous wife, the son received with a pregnant bride, the son given, the son purchased, the son self-given, the deserted son and the son begotten on any woman; and then adds, "of these the first in order is the most worthy; he alone is entitled to the heritage, and he shall maintain the rest."[1] It should be noticed that Vishnu omits the *kritrima* or

[1] Vishnu-Smriti, XV, 1—30,—Asiatic Society's Sanskrit Edition, pp, 43, 44.

the son made and includes Yatrakvachanotpádita as one description of son and thus completes the number twelve.

Vasishtha also enumerates the sons in the same order as Vishnu, substituting, however, the Sudrá-putra or the son born of a Sudra wife for Yatrakvachanotpádita, but he divides them into two groups of six each and declares that the first six are heirs and kinsmen and the second six are only kinsmen but not heirs. But he adds that there is also another tradition according to which the last six may become heirs on failure of the first six kinds of sons.[1]

So Yájnavalkya, after having described the sons in the following order, namely,—The real legitimate son, the son of the appointed daughter, the appointed wife's son, the secretly born son of an adulterous wife, the damsel's son, the son of a twice-married woman, the son given, the son bought, the son made, the son self-given, the son received with a pregnant bride and the deserted son;—declares,—"On failure of the first among these, the next in order is the giver of the *pinda* and the taker of the heritage."[2]

Likewise Yama declares:—"Sons are pronounced by wise saints to be twelve: of these six are kinsmen as well as heirs, and six are not heirs but kinsmen. Those versed in the law of class distinctions declare that the first is the son begotten by a man himself; the second, the son of the appointed wife; the third, the appointed daughter's son; the fourth, the son of the twice-married woman; the damsel's son is ordained the fifth; one secretly born in the house is the sixth: these six offer *pindas*. The deserted son, the son received with a pregnant bride, the son given, the son made, and fifthly the purchased son and the son self-given: these six whose filial relation proceeds from an overt act of acceptance are kinsmen but not heirs."[3] The common characteristic of the last six, stated in the concluding passage is worthy of special notice.

Similarly Nárada says:—"The real legitimate son, the son of the appointed wife, the son of the appointed daughter, the damsel's son, the son received with a pregnant bride, the secretly born son of a wife, the son of the twice-married woman, the deserted son, the son given, the son purchased, the son made and the self-given son: these are declared to be the twelve descriptions of sons; of these six are heirs and kinsmen, and six are not heirs but kinsmen. Each prior in order is considered superior, and one next in order inferior. Or, on the death of the father let them take the estate in their order: on default of the preceding most worthy, the next less worthy is entitled to the estate."[4]

So Hárita declares: "The son begotten by the man himself, the son of the

[1] Vasishtha-Smriti, XVII, 12—39.

[2] Yajnavalkya, II, 132 or 134.

[3] Yama, cited in Dattaka-Chandrika, V, 3.

[4] Nárada-Smriti, thirteenth topic, verses 45-47 and 49; Asiatic Society's Sanskrit Edition, page 202.

appointed wife, the son of the twice-married woman, the son of the appointed daughter, and the secretly born son of the wife are kinsmen and heirs (or heirs to kinsmen).[1] The son given, the son purchased, the deserted son, the son received with a pregnant bride, the son self-given and the son anyhow obtained are neither kinsmen nor heirs, (or are not heirs to kinsmen,[2] or are heirs but not kinsmen.[3])

So also Devala after enumerating the son of the body, the son of an appointed daughter, the son of the appointed wife, the damsel's son, the secretly born son of the wife, the deserted son, the son of a pregnant bride, the son of the twice-married woman, the given son, the self-given son, the son made and the son purchased,—says,—"These twelve sons have been ordained for lineage: some of them are *átmaja* or descended from the man himself; some, *paraja* or begotten on his wife by another man; some *labhdha* or acquired; and some, *yádrichhika* or filially related by their own consent. Of these the first six are heirs to kinsmen and the rest are so to their father alone. The rank of sons is determined by the order of enumeration. All these sons, however, are pronounced heirs of their father who has no real legitimate son: but should a real legitimate son be afterwards born, they have no right of primogeniture."[4]

The principles upon which this division is based are indicated in some of the texts cited above. The *átmaja* sons or those begotten by a man himself or descended from him bear a natural relationship to him, and it is for this reason that a real legitimate son, the son by the twice-married woman, the appointed daughter's son and the unmarried daughter's son appear to be preferred to strangers becoming sons by an act of adoption. As regards the son of an appointed wife, the secretly born son of an adulterous wife and the son received with a pregnant bride, who are *paraja* or sprung from the manhood of another person, it should be observed that they are filially related from their birth to their legal fathers, so that being themselves unaware of the origin of their birth they would look upon their mother's husband as their real father, and so far as they are concerned bear a close resemblance to the real legitimate son. Besides the fact of their not being the real sons of their legal father might be known to a very few persons and they are therefore likely to pass for real legitimate sons in society. Whereas all the adopted sons stand on a quite different footing: their actual parentage must be known to all. They themselves must be aware of the fact of their being fictional sons of their legal fathers, and their filial relation could not, on that account, be very strong. The deserted son who is a

[1] Colebrooke's Digest, Bk. V, verses 187-219,—Madras Edition, Vol II, pp. 331 and 349.
[2] *Ibid.*
[3] Dattaka-Chandrika, V, 10, Sutherland's Translation.
[4] Dattaka-Chandika, V, 15; Dáyabhága, X, 7.

foundling is an exception to the above rule, and it is perhaps for this reason that Devala places him in the first group. The circumstance, however, of the adopted sons being introduced into the family in the same modes in which slaves were brought in, appears to have attached a stigma on them. As regards the son of the twice-married woman and the son received with a pregnant bride, these sages are not unanimous with respect to their position. We have already seen that the re-marriage of a widow and the marriage of a woman after she has attained puberty and become *enciente*, are both disapproved by the sages. These blemishes of the mothers are visited on their sons, and Devala includes both of them in the second group; while the majority of the sages of this school place the son of a twice-married woman who is a real son in the first group, and the son received with a pregnant bride in the category of adopted sons. The Sahodha may be regarded as a son by adoption as he may be deemed to be received by gift, the acceptance of the mother in marriage being also the acceptance of the child in the womb; and this may be the reason why he should be classed as a son by adoption; you will observe that there were altogether seven descriptions of sons who are naturally related either to the man himself or to his wife or to his daughter, and who may be called sons by operation of law; and there are five descriptions of sons by adoption: and in classifying these twelve sons into two sets of six, one of the seven must be classed with the adopted sons; and this presented a difficulty and gave rise to the above divergence. It should also be noticed that although most of these sages agree as to the six kinds of sons included in the first group and as to those placed in the second, yet they are not at one with respect to the relative position and rank *inter se* of the six in each group.

The classification made by Manu, Baudháyana and Gautama, of the twelve kinds of sons into two groups, differs materially from the one just considered, and marks a latter stage of development or a different school of law. These rishis include some of the adopted sons in the first group and thereby assign them a superior position, while they substitute in their inferior place in the second group some of the contemptible sons by operation of law.

Thus Manu says:—"Of the twelve sons of men, whom Manu sprung from the Self-existent has described, six are heirs and kinsmen; six, not heirs but kinsmen. The son begotten by a man himself, the son of the appointed wife, the son *given*, the son *made*, the secretly born son of the wife and the *deserted* s . are the six, kinsmen and heirs: the son of an unmarried daughter, the son c a pregnant bride, the son bought, the son of the twice-married woman, the s i self-given and the son by a Sudra wife are the six kinsmen but not heirs."[1] ] should be noticed that the appointed daughter's son is not one of these twelve,

[1] Manu-Smriti, IX, 158-160.

appointed wife, the son of the twice-married woman, the son of the appointed daughter, and the secretly born son of the wife are kinsmen and heirs (or heirs to kinsmen).[1] The son given, the son purchased, the deserted son, the son received with a pregnant bride, the son self-given and the son anyhow obtained are neither kinsmen nor heirs, (or are not heirs to kinsmen,[2] or are heirs but not kinsmen.[3])

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[1] Manu-Smriti, IX, 158-160.

but he is to be deemed included in the first class, as he has been declared by Manu to be equal to a real legitimate son.[1]

Likewise Baudháyana after having described thirteen descriptions of sons refers to the tradition relating to their heritable rights in the following passage:—"They declare the real legitimate son, the appointed daughter's son, the appointed wife's son, the son *given*, the son *made*, the son of concealed birth and the *deserted* son to be entitled to the heritage; and they declare the damsel's son, the son received with a pregnant bride, the son purchased, the son of the twice-married woman, the self-given son, and the *nishâda* to be members of the gotra. Aupajandhani declares that the first among them (*i. e.*, *aurasa*) alone is entitled to the inheritance."[2]

Similarly Gautama declares:—"The real legitimate son, the appointed wife's son, the given son, the son made, the secretly born son of a wife and the deserted son are entitled to the heritage; the unmarried daughter's son, the son received with a pregnant bride, the son of the twice-married woman, the appointed daughter's son, the self-given son and the son purchased are entitled to be members of the *gotra*; and in default of the real legitimate son and others, are entitled to a fourth of the estate."[3] In one respect the view of this rishi appears to be very peculiar; for unlike all other sages he places the appointed daughter's son in the second class, while some declare him to be equal to the legitimate son and assign to him the second place; and others, the third in the order of enumeration. The author of the Mitákshará explains away this singularity by supposing it to relate to the son of an appointed daughter belonging to an inferior tribe.[4]

This division is an improvement on the earlier classification which was based on different principles. Manu and the other sages entertaining the same view, modified the earlier division so as to make it somewhat consistent with the advanced ideas taught by all the sages with respect to the purity of the marriage union; and assigned an inferior position to those sons that were regarded as contemptible on account of the usages recognizing them being opposed to the chastity and single-husbandedness of women. The importance of the chastity of damsels cannot be overrated, as the belief in the chastity of young girls is a powerful attraction to marriage; and it could have no foundation to rest upon, so long as the practice of a damsel bearing a son, or being with child before marriage should continue to be recognized in the way it was done. We have already seen that the rules laid down by the sages relating to marriage were all

[1] Manu, IX, 130 and 134.

[2] Baudháyana, II, 2, 3, 31-33,—Sacred Books of the East, Vol. XIV, p. 228.

[3] Gautama-Smriti, Ch. XXVIII, 32-34,—Sacred Books of the East, Vol. II, pp. 303-Ch. XXIX, 32-34,—Jibananda Bhattacharyya's Sanskrit Edition of Smritis, Vol. II, p. 433.

[4] Colebrooke's Mitákshará, Ch., I, Sect. XI, para. 35.

intended to eradicate the immoral usages. But those were merely theoretical at the time when the existing usages were recognized, and this slight modification of the earlier division of sons was a practical means for improving social institutions. The unmarried daughter's son and the son received with a pregnant bride were therefore placed by Manu in the second class, and so also the son of a twice-married woman. As to the appointed wife's son and to the son of an adulterous wife, who are by the sages placed in the first group, it may be observed that the husband is a consenting party to the wife's unchastity in the first case, and in the second he condones the wife's offence by accepting the son borne by her, for a husband's power to divorce a wife whose adultery is followed by conception is recognized by the Codes. If a husband is careless of his wife's chastity no legislation can secure it. These sages therefore left the wife's sons in the same position they had held before, as they were likely to vanish with the growth of the sense of honour and sentiment in a husband. Again when the husband recognized his wife's sons as his own, it would be extremely difficult to distinguish them from the real legitimate son: and this was another reason why they should continue in the first class.

The last stage of the classification of sons is that given in the following text of Vrihaspati who places the whole lot of illegitimate sons owing their origin to usages founded upon immorality and unchastity of females, in the lowest class:—"One alone, namely, the son of the body, is declared to be the owner of the wealth left by the father; the appointed daughter is equal to him; but the other sons shall only be maintained.[1] The son given, the deserted son, the son purchased, the son made, and the son by a Sudra wife; these, if pure by class, and irreproachable for their conduct, are held in a middle degree of estimation. The appointed wife's son, is contemned by good men; and so are the son of the twice-married woman, the son of an unmarried woman, the son received with a pregnant bride, and the secretly born son of an adulterous wife."[2] In another text the same sage declares: "The sons made in various ways by the ancient rishis, the powerless modern people have not the power to make now."[3]

The views expressed by Vrihaspati in the above passages were not new, they had in fact been intimated by all the previous sages. He does not, however, follow the customary rule of dividing sons into two groups, but adopts the higher principles enunciated by the earlier sages and gives them effect by dividing the sons into three classes and by declaring their rank to be superior, inferior or u ɔcre according as the usages to which they owe their origin are good, bad or

[1] Colebrooke's Digest, Bk. V, 215; Madras Edition, Vol. II, p. 343.
[2] Colebrooke's Digest, Bk. V, 202; Madras Edition, Vol. II, p. 337.
[3] Cited in Dattaka-Mímánsá, section I, paragraph, 64.

indifferent on moral grounds. He appears to condemn some, and to disapprove all, the subsidiary sons excepting the appointed daughter and endeavours to explain away the argument based upon the practice of ancient sages, in favour of the system of secondary sons, by affirming want of power in modern people to imitate the ancient sages with respect to affiliation of sons.

The conclusion to which any one carefully perusing the subject of sonship as dealt with in the Codes, must come, is that the usage of secondary sons was not introduced by them. It had been an existing institution from before the time when the Codes were composed, and was disapproved by all of them. The doctrine of spiritual benefit conferred by sons, was introduced by the rishis with a view to raise the position of the real legitimate son and to suppress the institution of the secondary sons. The passages in the Codes, extolling the possession of a son for spiritual purposes, do most if not all of them, relate to the real legitimate son; the secondary sons being declared worthless for those purposes. But although disapproving of the institution of the secondary sons, the sages did not declare invalid any one of them, though more or less condemned and censured.

In concluding the subject of the doctrine of spiritual benefit, I wish to observe that a person on perusing the passages of the Codes, declaring the importance of real legitimate sons in a spiritual point of view, may have the impression that the only virtue a Hindu has to practise in this life for the purpose of attainment of heavenly happiness in the next, is to marry and beget sons. But it must be remembered that the foundation of all virtues consists in self-abnegation and self-sacrifice. And there cannot be any doubt that the possession of wife and children teaches man to practise the virtue, of real self-sacrifice. The denial of comforts to one's own self for the sake of others is a virtue that is learnt by a man having a family of his own. To live for others, is the motto of all systems of religion, and a man with the responsibility of having a family cast upon him, begins to learn this virtue, in other words, real charity begins at home. Persons having superfluities may, without any sacrifice to themselves, make gifts for the benefit of others; but this may be attributed to kindness or vanity, and is not so meritorious, "for they cast in of their abundance." Besides, men having children are more closely connected with society and concerned with its well-being and its future than those having no issue, or single men who are generally characterized by extreme selfishness. Marriage and possession of children are calculated to make men more virtuous, and the Hindu sages whose legislation was entirely religious, and whose teachings were all directed to promote the ends of man as an infinite being, had a deep meaning in enjoining men to espouse wives for the purpose of having issue. Hindu society strictly following the injunctions of the Sástras in this respect, is distinguished for its charity and

virtues, so that the poor and needy persons living in it are provided for by the voluntary almsgiving of the people, and death by starvation is unknown in India except in a famine; whereas the civilized nations of Europe require the Poor Law for compelling them to support the indigent and destitute men amongst them.

LECTURE III.

# SOURCES OF LAW, COMMENTARIES AND THE TWELVE KINDS OF SONS.

Introduction—Sources of Law—Four Vedas, Sanhitás and Bráhmanas—Upanishads—Sruti—These unimportant—Six appendages of Vedas—Dharma-Sástras or Codes of law—Subjects treated therein and their division—Importance of some minor Codes—Customs—Mímánsá and Nyáya—Importance of Mímánsá—Vedánta or posterior Mímánsá—Eighteen Puránas, and Upa-puránas—Their character—Theory of their authority—Jurisprudence not their subject—Smriti and theory of divine origin of law—Theory not peculiar to Hindus—Conception of law—Commingling of religious and legal rules—Doubtful whether all rules enforced—Hindu Codes complete—Accusation of incompleteness not correct—Lawgivers ministers of kings—Different Codes progressive—Slowness of progress, its causes and contrast with Roman law—Effect of Mahommedan conquest on Bráhmanical mind, its religious turn—Commentaries—Conflict of law and its reconciliation—Positive law not within scope of Sástras, and classification of rules properly within it—Mitákshará on this point—Its advanced ideas, division of rules into mandatory and directory—Law and popular feelings—Mitákshará and Dáyabhaga not speculative—Commentaries and sonship—Mitákshará—Mithila School, Viváda-Ratnákara—Viváda-Chintámani—Bengal School, Dáyabhága—Smriti-tattva of Raghunandana—Vrihan-Náradíya Purána on prohibitions for the Kali age—Áditya-Purána on the same—Víramitrodaya—Nírnaya-Sindhu and Viváda-Tándava—Nanda Pandita—His commentary on Vishnu-Smriti—His Dattaka-Mímánsá—Institutes of Parásara—Mádhava-Acharya's commentary on the same—Aparárka—Other special treatises on adoption—Vyavahára-Mayúkha of Nílakantha—Smriti-Chandiká — Vyavahára-Madhava—Visvesvara and Bálambhatta — Divergence between earlier and later commentators and also between the latter—Character of Sanaka's work—Authority of minor Puránas—Question, whether these can override Smritis, never raised—Reasons for the negative—Origin of the doctrine of prohibitions for the Kali age—Their character—Prohibition as to sonship—Conclusion.

In the last lecture I have endeavoured to show that the generally-received theory of the religious origin of adoption amongst the Hindus is not supported by the Codes which introduced and gave prominence to the doctrine of spiritual benefit. On the contrary a careful examination of all the Codes that have dealt with the subject of sonship in its entirety, leads to the conclusion that while recognizing the various descriptions of sons, as an ancient and subsisting institution of society they attempted to discourage and discountenance it u n religious grounds alone. But although the religious ordinances relating o marriage and sonship, were all directed against the usage of secondary sons l calculated to suppress and abolish in the course of time the most reprehen l if not all of them, yet the legality and validity of all the substitutionary s s

remained unaffected by the legislation of the Rishis. I proceed now to discuss how the commentaries have dealt with this subject of the different kinds of sons. But before entering into that subject, I think it necessary to make a few observations on what the commentators profess to interpret as being the sources of law, as also on their theory of law, classification of its rules, mode of its construction, and the progress in its conception.

**The sources of law** are enumerated in the Codes themselves. Manu says: —"The roots of *dharma* or law are the whole *Veda*, the *Smriti* or recollection, and the practices of such as perfectly understand it, the immemorial customs of good men, and self-satisfaction.[1] The Veda, the Smriti, approved usage and satisfaction of one's soul or conscience have been declared to be the quadruple direct evidence of law."[2] Similarly Yájnavalkya declares:—"The *Sruti*, the *Smriti*, approved usage, self-satisfaction and a perfectly lawful desire are ordained to be the sources of *Dharma* or law."[3] In an earlier passage the same Rishi declares,—"The four Vedas, together with their six appendages, the Dharma-Sástra, the Mímánsá, the Nyáya, and the Puráṇa are the fourteen sources of knowledge, and of *dharma* or law."[4] This lawgiver then names Manu and nineteen others as the compilers of the *Dharma-Sástras* or codes of law.[5] Manu explains the terms *Sruti* and *Smriti* thus,—"By *Sruti* (or what was heard from the Deity) is meant the Veda; and by *Smriti* (or what was traditionally remembered from the beginning) the *Dharma-Sástra* or the Institutes of law."[6] The word *Dharma-Sástra*, which means 'teacher of law,' is, however, sometimes employed in its literal sense to designate both the *Sruti* and the *Smriti*. You will observe that in the above passage the word *dharma* or law has been used in the widest sense. It is derived from the root *dhri* to hold, support or sustain; and it means law or duty in the most extensive sense and also the property of a thing. Hence a deliberate desire not opposed to an express rule of law is stated by Yájnavalkya as a test for determining the lawfulness or otherwise of any act done by man; man being regarded as responsible for every act or omission of his, which affects his spiritual condition.

**Vedas, Sanhitás and Bráhmanas.**—The earliest sacred writings are called the *Vedas*. These were compiled and arranged in the present order by Krishna Dvaipáyana, the son of Parásara, who thence obtained the surname of Veda-Vyása, that is, compiler of the Vedas, and who is now generally cited by the name Vyása or the compiler. He distributed the Hindu scriptures into four parts which are severally entitled, Rik, Yajush, Sáman, and Átharvana; and h of which bears the common denomination Veda. Each of these four Vedas

[1] Manu II, 6.
[2] Manu II, 12.
[3] Yájnavalkya I, 7.
[4] Yájnavalkya I, 3.
[5] Yájnavalkya 1, 4 and 5.
[6] Manu II, 10.

consists of two parts, the first is called its Sanhitá, and the second its Bráhmana. The Sanhitá contains the mantras or hymns, prayers and invocations, and may be called the text of the particular Veda; while the Bráhmana, is its supplemental or explanatory addition, comprising precepts inculcating religious duties, maxims explaining these precepts, arguments relating to theology, and legends and stories concerning gods, sages, and kings. Of the four Vedas the Rig-Veda occupies the most prominent positions and appears to be the most ancient. Its Sanhitá contains upwards of a thousand súktas or hymns in metre, which are for the most part encomiast, as the name of the Rig-Veda implies. The etymological meaning of the word *Rik*, according to Sáyana, the celebrated commentator of the Vedas, is that which praises; and the *Riks* praise either a god, or a thing, or the instrumentality of a thing for pleasing the gods. The Yajur-Veda relates chiefly to sacrifices, as the name itself implies. Its Sanhitá contains prayers and invocations some of which are in metre and denominated Rik, and the rest are in measured prose or simple prose. This Veda is divided into two portions of which one is denominated Black and the other White. The Sáma-Veda, consists of prayers composed in metre and intended to be chanted at sacrifices. A peculiar degree of holiness is attached to it as it is believed to be efficacious in removing sins. The Atharva-Veda contains hymns, incantations and forms of imprecations for destroying or injuring an enemy, and prayers for safety from an enemy or for averting calamities. As the idea of injuring another, be he even an enemy, is opposed to the spirit of Hinduism, the Atharva-Veda was not much respected and came to be regarded with disapprobation. You will find in Smritis and other sacred writings that the Vedas are for this reason referred to as three in number, the Atharvana being suppressed. Although the Yajush has been said to relate to sacrifices as being directly concerned with them, yet all the Vedas appear to be intimately connected with the performance of sacrifices and religious ceremonies in which the hymns, prayers or incantations are to be used or chanted; they form what is called the *Karma-kánda* or that portion of the Sruti or revelation which is concerned with religious ceremonies, or practices.

**The Upanishads** are denominated the Vedánta or the concluding portion of the Veda, and are represented as the head, or the best part of the revelation. In comparison with the four Vedas, they are characterized as *parú* which may mean either posterior or superior, and the Vedas are called *a-parú* anterior or inferior. The Upanishads teach of the Supreme Being, His attributes and perfections, and of the attainment of beatitude by means of the knowledge of the divinity; they form the foundation of the whole of the Hindu theology. Th
are denominated the Jnyána-Kánda or that portion of the revelation wh
deals with true knowledge as distinguished from ceremonial observances treat
in the four Vedas. The Upanishads are connected with particular Vedas, a
some of them embody portions of the Bráhmanas relating to them, so tha

sharp line of distinction cannot be drawn between the different divisions of these earliest sacred writings.

**Sruti.**—The four Vedas consisting of the Sanhitás and the Bráhmanas, and the Upanishads are all believed by the Hindus to have been revealed by the Deity to man and to record His very words: and hence they are denominated *Sruti* or what was heard. *Sruti* is defined to be "words pronounced by the Self-existent, that are eternal having neither a beginning nor an end."[1] The individuals who were inspired, that is, to whom any portion of the revelations was communicated are called Rishis, and their names are preserved in connection with the particular portions of the Vedas, of which they were the inspired speakers.

**These unimportant to lawyers.**—This voluminous literature is not of much importance to practical lawyers, as it does not at all deal with positive law, but is confined exclusively to the consideration of religious rites and duties. But these writings furnish us with materials though indirect and meagre from which the state of early society and its usages may be gathered; and there are some passages containing an incidental allusion to a rule of law, or giving an instance from which a rule of law or usage may be inferred. An indication afforded by these sacred writings, of any rule, however, is considered to be entitled to very great respect and to be more authoritative than a precept of the Smriti or Codes.[2] There are several passages in the Rig-Veda, alluding to some descriptions of sons,[3] and there are legends related in other Vedik writings giving instances of adoption. And these are important in this respect that they afford evidence of the existence in the earliest times, of the usages relating to secondary sons, a fact which is evident from the manner in which the subject of sonship has been dealt with in the Codes which recognize the institution of secondary sons, though they are not favourably disposed to it.

**The six angas** or appendages of the Vedas are:—

(1) the Sikshá or orthography and orthoepy, dealing with the modes of correct pronunciation of the letters of the sanskrit alphabet;

(2) the Kalpas, or treatises dealing with the ritual or process of performing the sacrifices;

(3) the Vyákarana or grammar which deals with radical words, their declensions and conjugations, their derivates and the mode of the formation of the latter;

(4) the Chhandas or prosody treating of the Vedik metres;

[1] Sáyana's Introduction to his Commentary on the Rig-Veda,—Max Müller's Edition, Vol. age 21.

[2] Dattaka-Mímánsá Section I, para. 12.

[3] See Sarvádhikari's Tagore Lectures, page 218.

(5) the Jyotisha or astronomy, the study of which is necessary for determining the proper seasons and periods for the performance of sacrifices; and

(6) the Nirukta or thesaurus or lexicon of words containing a collection of synonymous words and their meanings such as the Nirukta of Yáska.

These are to be studied by a student of the Vedas in order to enable him to read and pronounce them properly, understand their meaning correctly and to make use of them for sacrificial purposes. An incorrect utterance of the hymns, prayers and incantations mars the efficacy of a sacrifice and renders it defective so as to produce sometimes the very opposite result. These sciences however cannot be regarded as sources of law.

**The Dharma-Sástras or Codes of law** are the real sources of law in a lawyer's point of view. These are denominated Smritis and believed to contain precepts emanating from the Deity. The distinction between Sruti and Smriti consists in this that the former consists of the exact words pronounced by God, while the latter embodies the purport of the divine precepts, but not the exact words in which they had been delivered. The language in which these precepts are recorded is of human origin, but the precepts are divine. The theory of Smriti or *remembrance* is, that the rules contained in the Code had been originally communicated to primeval men and handed down by tradition until they were recorded in the present form as *remembered*. There are numerous works to which the name of Smriti is applied, but the exact number of them cannot be given with any degree of precision. In the Institutes of Yájnavalkya twenty Rishis are mentioned as the compilers of law; thus:—"Manu, Atri, Vishnu, Hárita, Yájnavalkya, Usanás, Angirás, Yama, Ápastamba, Sambarta, Kátyáyana, Vrihaspati, Parásara, Vyása, Sankha and Likhita, Daksha, Gautama, Sátátapa and Vasishtha, are the propounders of the Codes of law."[1] But the Mitákshará while commenting on this text observes that this enumeration is not exhaustive since Baudháyana and others are also recognized as lawgivers. It is remarkable that the name of Nárada has not been included in Yájnavalkya's list, although the commentators on positive law constantly invoke his authority by citing texts from his Code, in support of the expositions of law given by them. There is no complete authoritative list of the works denominated Smriti; one may, no doubt, be prepared by a person on perusing all the commentaries on law and religious rites. But it should be observed that the latest commentators cite passages from the largest number of works which are called Smriti by them. Most of these again are not found at all in a separate or complete form. These facts raise considerable doubt as to the authencity of most of them.

**Subjects of Codes.**—The Codes of law, taken as a whole, deal with the du of man as a spiritual being of infinite existence: and they devote greater attent to religious duties than to secular matters. They do not appear to attach m

[1] Yájnavalkya, I, 4 and 5.

importance to the present finite existence of man, which they deal with as a merely connecting link between the infinite past and the infinite future. The rules that have been laid down in the Codes for the guidance of man in this world are all directed to his spiritual development: and most of the Codes do not at all deal with positive law or the body of rules relating to the rights and duties of men as members of society, while some deal with only a portion of it and a few with all its branches. There are only two Codes that deal with all branches of law, in its widest sense, namely, the Codes of Manu and Yájnavalkya, which treat not only of the religious rites and duties but also of *Vyavahára* or the Jurisprudence of positive law in a systematic form. The Code of Yájnavalkya appears to be the most systematic, and is divided into three books called Áchára, Vyavahára and Práyaschitta respectively: the first deals with religious rites and duties; the second, with jurisprudence; and the third, with sins and their atonement, and with true religious knowledge. These two may be considered as complete Codes in the Hindu view. The other Rishis enumerated by Yájnavalkya as compilers of law, do not appear to have given complete Codes; some are not extant such as are attributed to Kátyáyana and Vrihaspati, though many texts are cited from their Codes by the commentators on positive law; while the rest of them all deal with religious matters, and excepting two or three, also with sonship and inheritance, but not with other branches of positive law. Of the Codes not enumerated by Yájnavalkya, those of Nárada, Baudháyana, Devala and Paithínasi, deserve special notice as their authority is admitted by the leading commentaries on Hindu law. The Code of Nárada does not deal with religious matters, but is confined to Jurisprudence or secular law alone, and as such is a unique treatise. Baudháyana and Devala both deal with sonship and inheritance, the former deals also with religious rites and duties; but the latter's Code is not extant.

**Importance of some minor Codes.**—Of the Codes that do not deal with any branch of Hindu jurisprudence, and are on that account unimportant in a lawyer's point of view, there are four that are entitled to special notice, since the law of adoption, as enunciated by the latest commentators, is entirely based on them. They are the Codes of Atri, Parásara, Saunaka and Sákala, not a single text from which is cited in the Mitákshará or the Dáyabhága the two leading commentaries of paramount authority on the law of inheritance.

**Customs.**—With the Smritis are classed approved immemorial customs which are not recorded in the Codes, but are observed by the virtuous. These, like the Codes, are supposed to be based upon revelation; both are believed to be founded upon divine precepts and handed down by tradition and observance. Those that were compiled were embodied in the Codes, and the unrecorded ones continued to be observed in practice. The immemorial customs are declared to be a source of law, as the existence of revelations ordaining the approved customs is to be presumed from the fact of the observance of such customs.

**Mímánsá and Nyáya.**—The Mímánsá and the Nyáya mentioned by Yájnavalkya as sources of knowledge and law, consist of rules for construing and interpreting the divine precepts contained in the Sruti and the Smriti. The Mitákshará explains Mímánsá to mean, the discussion of Vedik texts; and Nyáya, the science of reasoning. Mímánsá, however, is the name of a School of Hindu philosophy founded by Jaimini, the object of which is to establish the cogency of precepts contained in the Scripture, and to furnish maxims of interpretation, by means of the rules of reasoning. And the Mitákshará evidently means to indicate Jaimini's philosophy by giving the meaning of its name. A system of philosophy is denominated Nyáya or the logical school. The word Nyáya means also a canon of construction or interpretation.[1]

**Importance of Mímánsá.**—With respect to the Mímánsá philosophy of Jaimini, Colebrooke observes:—"The disquisitions of the Mímánsá bear, therefore, a certain resemblance to juridical questions, and, in fact, the Hindu law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to the one as to the other. The logic of the Mímánsá is the logic of the law; the rule of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of law: and this is, in truth, what has been attempted in the Mímánsá. * * * Instances of the application of reasoning, as taught in the *Mímánsá*, to the discussion and determination of juridical questions, may be seen in two treatises on the Law of Inheritance, translated by myself, and as many on Adoption, by a member of this Society, Mr. Sutherland. (See *Mitákshará* on Inheritance 1, 1, 10 and 1, 9, 11, and 2, 1, 34; *Jímúta Vahana* 11, 5, 16-19. *Datt. Mím.* on Adoption 1, 35-41 and 4, 65-66 and 6, 27-31. *Datt. Chand.* 1, 24 and 2, 4.)"[2]

**The Vedánta**—School of philosophy, the founder of which is Vyása is also denominated Mímánsá, and in order to distinguish it from Jaimini's philosophy, the Vedánta is called the Uttara or posterior Mímánsá; and the other, the Púrva or prior Mímánsá. This division is similar to that between the Vedas and the Upanishads and based upon the same principle: the Mímansá of Jaimini deals with the practical or ceremonial precepts; whereas that of Vyása relates to the theoretical or theological precepts contained in the Upanishads. But as the school founded by Vyása has a distinct name of its own, the word Mímánsá when used without qualification, means Jaimini's philosophy. The later Mímánsá is supplementary to the prior; and they are parts of one who The two together comprise the complete system of interpretation of the pr cepts and doctrines of the Scriptures, both practical and theological. The ru

[1] Dattaka-Mímánsá, VI, 28.

[2] Transactions of the Royal Asiatic Society, vol., I, page, 457.

furnished by them are followed by the commentators as authoritative while discussing doubtful questions of law.

**Puránas and Upa-puránas.**—The last source of knowledge and law, according to the text of Yájnavalkya is the Puráṇa, which is explained by the Mitákshará to refer to "the Bráhma and others." A large number of voluminous works are denominated Puránas, and some of them enumerate eighteen different works bearing that title. The Vishnu-purána[1] gives the following list:—the Bráhma-purána, the Padma-purána, the Vishnu-purána, the Siva-purána, the Bhagabat-purána, the Nárada-purána, the Markandeya-purána, the Agni-purána, the Bhavishya-purána, the Brahma-vaivarta-purána, the Linga-purána, the Baráha-purána, the Skanda-purána, the Bámana-purána, the Kurma-purána, the Matsya-purána, the Garuda-purána and the Brahmánda-purána. In another enumeration of the eighteen Puránas the Váyu-purána is mentioned instead of the Siva-purána. The eighteen are considered the principal Puránas, and there is another group of similar writings denominated Upa-puránas or secondary Puránas, such as the Kalika-purána: so one of the two, namely, Váyu or Siva Puráṇa must be placed under the latter class. Of the Puránas the Adi-purána, the Vrihan-náradiya-purána and the Káliká-purána belonging to the secondary group deserve special notice, as the latest commentators rely upon their authority, for supporting certain novel propositions of Hindu law, of very great general importance, as also for establishing some important matters relating to the law of adoption.

**Their character.**—These Puránas are mythological poems which purport to give an account of creation, to narrate the genealogy of gods, of ancient dynasties and of sacerdotal families, and to describe the different ages of the world; and in doing so they deal also with religious rites and duties. The object which the writers of these works had in view was to establish the Bráhmanical supremacy by putting down Buddhism, Jainaism, and similar religious doctrines, that inculcated religious equality of men and were opposed to their interests. They multiplied religious rites, the celebration of which has been the means of support to the inferior class of Bráhmanas who officiate at them. The hearing of these works being read is praised by them to be of very great religious merit; and their recital has been a source of profit to Bráhmanas. But the fact that these could be heard even by Sudras, when read by Bráhmanas, is against their pretension to be ranked with the Vedas. The modern idolatory amongst the Hindus owes its origin to these Puránas, for no trace of it can be found in the earlier sacred writings already noticed. The antiquity of some among the Puránas now extant is more than questionable, some appear to contain recent interpolations and additions; while none appear to be very ancient.

[1] Vishnu-purána, 3, 6, 22—24.

**Theory of their authority.**—These Puránas together with the Itihásas aspire to the title of the fifth Veda. In some passages of the Vedik writings, the words Itihása and Purána are used to designate certain portions of the Bráhmanas, containing either stories of gods or men, or cosmogonic traditions.[1] In the Chhándogya Upanishad the Itihasa and Purána are represented to constitute the fifth Veda, in a passage from which it is not clear what is meant by these words.[2] It may very well be supposed that these words were employed by the speaker intending to include under the fifth Veda the Bráhmanas themselves, that contain such stories or traditions. But passages like these in the Vedas enabled the later Bráhmanical writers to pass on their spurious works as authoritative, in the following way. The Vedas were, as I have already told you, compiled and arranged into four parts by Vyása, who is also the author of the Mahábhárata the celebrated epic poem which is denominated Itihása; and the authorship of the eighteen principal Puránas also is ascribed to the same Vyása: in this manner the compiler of the Vedas is supposed to have compiled the Itihásas and the Puránas that constitute the fifth Veda. This account of the origin of the Puránas is furnished by some of the Puránas themselves.[3] But the claim to be ranked with the Vedas, thus put forward is weakened by the fact that while the number of these works is limited to eighteen only, according to some of the Puránas themselves, there are more works of the same title, besides the Upa-puránas. At any rate these latter cannot be considered as authoritative upon the above theory, which attributes the authorship of eighteen Puránas only to Vyása. It should be noticed here that the distinction between Puránas and Upa-puránas have arisen in consequence of the above enumeration of the Puránas; those that have not been so enumerated are called Upa-puránas though all these works style themselves as Puránas. The writers who gave the enumeration, were not aware that the members of their class would require more works of the kind to serve their purpose.

**Jurisprudence, not their subject.**—Jurisprudence, however, does not come within the scope of the subjects that are according to the Puránas themselves, dealt with in them. Some of the Puránas, however, have incorporated in them portions of the Codes, relating to positive law,[4] and there are a few passages in some of them, bearing on law. But these are not looked upon by leading commentaries on positive law as any authority, although they are sometimes cited as illustrative of the law contained in the Institutes. I am not aware of any instance in which the Mitákshára has referred to any passage of the Puránas; but the Dáyabhága has only in one place cited a passage from the Márkandeya-purána;[5] and

[1] Max Müller's Ancient Sanskrit Literature, page 40.

[2] Chhandogya Upanishad, ch. 7, § 1.

[3] See Vishnu-purana, 3, 6.

[4] Agni-purána's Chapter on inheritance is *verbatim* the same as in Yájnavalkya's Institut

[5] Dáyabhága, XI, 1, 41.

another, one from the Mahábhárata,[1] to illustrate matters that are more religious than legal. With respect to the authority of the Puránas in legal matters, Professor Wilson observes that "the Puránas are not authorities in law. They may be received in explanation or illustration, but not in proof."[2] This view appears to legitimately follow from a consideration of the texts of Manu and Yájnavalkya on the sources of law. Manu does not include the Puránas as a source of law;[3] and Yajnavalkya[4] having enumerated the fourteen sources of knowledge and law, one of which is the Purána goes on to declare[5] that the Sruti, the Smriti, the approved customs, what is agreeable to one's conscience, and a perfectly lawful and well-considered desire, are the roots of law, that is to say, the evidence of law according to the interpretation of the Mitákshará. This latter text is almost identical with the text of Manu declaring the sources of law. Hence on a consideration of the two texts of Yájnavalkya, it would appear that the sage intended to declare the *Purána* as a source of knowledge and not of law; and although the Mitákshará explains the term to refer to Bráhma and the like, it is doubtful whether the sage intended to allude to any of these works or to the cosmogonic traditions which were not recorded at his time, and which, have subsequently been compiled in some of these works and mixed up with later inventions of the same kind.

**Theory of divine origin of law.**—From what I have already said in the course of discussing the different sources of knowledge and law, enumerated by Yájnavalkya, it is clear that the Hindu jurisprudence is contained in the principal Institutes or Codes denominated the Smriti, which like the Vedas aspire to a divine origin. This theory of the entire body of law, both religious and secular, emanating from the deity is maintained by Manu whose Code is admitted to hold the highest rank amongst the works called Smriti. A text of Vrihaspati declares—"A Smriti or rule of law, that is opposed to the sense of Manu's Institutes, is not approved; since the superiority of Manu's Code is ordained by reason of its embodying the purport of the Veda or revelation."[6] The account which Manu gives of the divine origin of his Code is to the following effect: the Brahmá having enacted that body of laws, communicated it to him in the beginning, afterwards he taught it fully to Marichi, Atri, Angirás, Pulastya, Pulaha, Kratu, Prachetas or Daksha, Vasishtha, Bhrigu and Nárada; and being requested by the holy sages to apprize them of the sacred laws, directed Bhrigu to recite the divine Code to the sages.[7] The present Code is the one promulgated by Bhrigu. From this account it appears that the different Institutes of law owe their origin directly or indirectly to Manu's teaching. We find the names of Atri, Angirás, Daksha, Vasishtha and Nárada amongst the ten sages whom Manu taught the divine

[1] Dáyabhága, XI, 1, 60.
[2] H. H. Wilson's works, vol. V, page 46.
[3] Manu, II, 6 & 12.
[4] Yájnavalkya, I, 3.
[5] Yájnavalkya, I, 7.
[6] Cited in Srikrishna's commentary on the Dáyabhága, 1, 1.
[7] Manu, I, 35, 58-60.

laws, and there are Codes the authorship of which is attributed to Atri and the other four sages respectively. According to this theory, all the different Institutes of law are to be considered as compilations of the same body of laws, originally derived from one source, but taught in different schools, and as supplementary to each other.

**Theory not peculiar to Hindus.**—The belief in the divine origin of an entire body of laws, is not peculiar to the Hindus. The Bible and the Koran are works believed by the Christians and the Mahomedans respectively to contain precepts communicated by God to man. The Bráhmananical theory whereby the Institutes containing rules relating to religious rites and duties, as well as to secular matters were represented to be divine revelations, tended to impart a stationary character to Hindu civilization and to impede the progress of Hindu society. Had the theory been confined to religious matters alone, it would not have been so detrimental to social improvements as it has been. It was, however, necessary for the purpose of securing the Bráhmanical superiority which is maintained by all the Codes, that their authority should be founded upon the above theory; since no earthly reason could be suggested for supporting the doctrine of the inherent superiority of the sacerdotal class, to the rest of the community.

**Conception of law and state.**—Agreeably to the theory of the divine origin of laws of all descriptions, the conception of law, presented by the Hindu lawgivers differs very materially from the modern notion of it such as has been elaborately analyzed and discussed by Austin. According to modern view the sovereign is the fountain source of positive law, or in other words positive laws are rules of conduct set by political superiors to political inferiors and the observance of which is enforceable by political sanctions; and a broad distinction is drawn between rules of religion, morality and positive law, based upon the nature of the sanction: whereas, according to the Hindu sages laws of every description emanated from the Supreme Being Himself. According to this theory of its origin, law was independent of the state, or rather the state was dependent on law. The Hindu legislators, professing to promulgate the divine laws, laid down rules relating to even the rights and duties of a king; while, apart from these divine precepts propounded by the Institutes for his guidance, a Hindu king was practically an absolute monarch, who was responsible to God alone for the observance or non-observance of the said rules. There is no doubt that a king refusing to follow them would incur the displeasure of the Bráhmanical hierarchy, who formed a powerful body distinguished by spiritual and secular learning a possessed considerable influence on the lower classes of society. The Co that were all composed by members of the Bráhmanical class are characteriz by the partiality shewn to their own tribe which is asserted to be superior ev to the warrior class to which the king belonged. But while assigning to t

Kshatriya class a position inferior to theirs, the Bráhman lawgivers perceived that it was necessary to make an exception in favour of the reigning king, who was therefore flattered into the belief that he was an incarnation of the gods presiding over the different regions of heaven, and as such, superior to all mortals including the Bráhmanas themselves.[1] In this way the Bráhmanas succeeded in raising their own position and becoming the repositories and expounders of law. The form of government of the Hindu kings was a monarchy practically absolute but theoretically limited by a divine constitution. The idea of a political superior according to the Institutes did not carry with it the power of making laws for the guidance of the community. The function of the king according to Hindu notions was defined by the divine law, and it consisted of the duty of protecting the people from foreign invasion and of seeing that the divine laws are observed by the people; but he was equally with his subjects bound to obey the selfsame laws. But it is conceded that in matters of executive government, about which the Institutes are silent, royal edicts have the force of law, if not inconsistent with the precepts of the Sástras. According to the Institutes the king had the duty to enforce the observance by his subjects, not only of the secular law but also of the religious duties and caste rules; and it should be observed that the transgression of a rule that is purely religious is also an offence and punishable by the king, while the violation of a purely secular rule is not only an offence but a sin too.

**Commingling of religious and civil rules.**—Although the Hindu sages have, according to their theory of divine origin of laws, mingled up religious, civil and moral ordinances without any regard to differences in their essential character and incorporated them as parts constituting an entire Code, yet it cannot be affirmed that the inherent distinction between the different kinds of rules was not perceived by the sages. Ordinances that are of a purely religious character generally concern members of a society individually, so that a violation of them by one man is seldom if ever injurious to the person or property of another; while rules of legal effect are of a quite different character and a breach of them affects the interests of others. Nor can the mode of enforcing the observance of the different kinds of ordinances be the same; accordingly there may be religious and moral sanction only in the one case and legal sanction in the other. Although the king is enjoined to enforce the observance by his subjects of the religious ordinances, it is a duty hich is more than what a human king can perform; for ordinarily there would be ) person interested in taking the trouble of lodging any complaint before the king, erefore except in cases of a serious nature causing excitement of the community, information is likely to reach the king of any breach of religious duties. nance and excommunication or degradation are the only ways in which

[1] Manu, VII, 4-8.

offences against religion might be expiated and punished; and accordingly while the sages provide different modes of expiation for the atonement of various descriptions of sins, they provide legal punishment generally for those offences that partake of the character of legal wrongs. A breach of the rules of civil nature, consisting as it does of the invasion or withholding of another person's rights, stands upon a different footing altogether; and the injured person is entitled to have a legal remedy in the king's Court, which he is interested in seeking for the reparation of the wrong done. This broad distinction between the civil and religious ordinances could not fail to strike the Hindu legislators, notwithstanding their view with regard to the origin of laws. The arrangement of the rules relating to different subjects dealt with in the complete and exhaustive Codes of Manu and Yájnavalkya discloses the recognition of the above distinction especially by the latter. Manu's Code is divided into twelve chapters of which the eighth and the ninth are devoted to jurisprudence; and the second of the three books into which the Institutes of Yájnavalkya is divided, is styled 'litigation' and deals with the same subject. While the Institutes of Nárada, which treats of nothing else but Jurisprudence, appears to indicate that the Hindu sages were not unconscious of the distinction between purely religious ordinances and legal rules. But at the same time it should be observed that the sages in dealing with the civil law appears to have recognized the customs and usages actually existing in society, some of which were disapproved and censured by them on moral and religious ground; thus there is an intermingling to a limited extent of the religious and moral rules with the civil law.

**Doubtful, whether all rules enforced.**—Regard being had to the fact that the comprehensive Institutes of Manu and Yájnavalkya professing to deal with the religious, moral and legal duties of man have put together rules of different descriptions, there cannot be any doubt that the laws so codified do not in their entirety represent what were at the time of its promulgation or at any subsequent period actually observed in practice or enforced, especially those relating to the religious ceremonies, the caste duties and the strict discipline of a Bráhman's life. With respect to the Code of Manu, Sir Henry Maine observes:—"The Hindoo Code, called the laws of Manu, which is certainly a Bráhmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actively administered in Hindustan. It is, in great part, an ideal picture of th t which, in the view of the Bráhmins, *ought* to be the law."[1] This observati n of the eminent jurist may no doubt apply with great force to those rules th t relate to matters lying beyond the province of jurisprudence. But as regar s

[1] Ancient Law, page 17.

the body of the rules falling within what the Hindu jurists denominate *Vyavahára* or litigation, they are certainly not open to the same remark. Under the Hindu kings, the Bráhmanas were usually appointed the minsters of justice and advisers of the kings in matters of administration of justice, and the law contained in the Institutes formed the guide for judges to decide cases. But it is doubtful whether the privileges claimed by the sacerdotal class and incorporated with rules of civil law were actually accorded to them.

**Hindu Codes complete.**—The civil law contained in the Codes of Manu, Yájnavalkya and Nárada provides rules for meeting all the wants of a simple society like that of the Hindus. It deals with both the adjective and the substantive law: the former deals with the constitution of Courts, the procedure, and the evidence; and the latter, with the different branches of law under eighteen heads called topics of litigation, or forms of Action. They are[1] (1) recovery of debts, (2) recovery of deposits and pledges, (3) inheritance including adoption, (4) boundary disputes including wrongful ejectment, easement, and alluvion and diluvion, (5) disputes between master and neatherd or other servants, (6) sale without ownership, (7) revocation of gift, (8) rescision of a sale or purchase, (9) partnership, (10) violation of established class-usage and of contracts, (11) non-payment of wages, (12) gaming, (13) slander and abuse, (14) assault, (15) violence, (16) theft, (17) adultery, and (18) duties of man and wife. The Mítakshará adds another head under the name of Miscellaneous, which comprises some matters not coming under the eighteen topics, and proceedings initiated by the king.

**Accusation of incompleteness not correct.**—It has, however, been asserted by an eminent jurist that the codified law of the Hindus is not complete and exhaustive, as "large departments of law are scantily represented, or not at all;"[2] and the scarcity of rules relating to the tenure of land is advanced as an argument in support of the proposition. This erroneous view appears to have originated in the assumption that the present system of land tenures which is of recent growth, and was in fact introduced by the British Government, had existed during the Hindu period. The Hindu theory of property in land, was that it belonged to the cultivators and occupiers who or whose predecessors had brought it under cultivation or cleared it of jungle.[3] They had to pay an income-tax to the ruling power, consisting of a certain share of the produce yielded by the land in their occupation;[4] and this used to be collected by certain officers placed in subordination of each other,

[1] Manu, VIII, 4-7.

[2] See Maine's Village Community, page 51.

[3] Manu, IX, 44.

[4] Manu, VII, 130; 115-118.

whose offices were generally hereditary according to the Indian usage relating to all occupations. The king though styled the lord of land or earth had no sort of proprietory right over the land in the possession of his subjects; the share of the produce received by him was tax and not rent.[1] Nárada declares: "The tax (or revenue) which under the name of 'share' is derived (by the king) from land and other usual sources, is ordained his remuneration for protecting the subjects."[2] The charge of incompleteness brought against the codified law of the Hindus, therefore appears to be groundless. But it is worthy of observation that the law of marriage has not been included in the subjects discussed under the different topics of litigation; it has, however, been dealt with as a part of the Áchára or customary rites. The Hindus are so careful about their marriage which is regarded as a religious ceremony of a very great importance, that the question as to validity of marriages arises very rarely even at the present day. There was perhaps no litigation of that kind possible in early times, or it may be that the sages did not allow any Action to be brought to invalidate a marriage which had once taken place, when there was no uniformity in the customary rules relating to it, a fact which appears from the different Codes as also from the divergent usages of different parts of India.

**Lawgivers ministers of kings.**—From the accounts given in the sacred writings of some of the sages to whom the compilation of the different Codes is ascribed, it would appear that they were ministers of ancient kings. In the Vrihad-Áranyaka Upanishad, Yájnavalkya is represented to have displayed in the Court of king Janaka, the superiority of his theological learning over all the Bráhmanas assembled at a solemn sacrifice celebrated by the king at great expense, and carried away the prize of a thousand cows; and it appears from the discourse that the king appointed the sage his minister and adviser. Janaka was the king of Mithila, or modern Tirhoot, the place where, according to the account given in the Code of Yájnavalkya,[3] he taught the law to the assembled sages at their request. Vasishtha is well known to have been the minister of the solar kings of Ayodhyá or Oude; the name of the founder of the family appears to have been Vasishtha and it became the surname of the family or the title of that member of it, who held the hereditary office of the minister; for it is impossible to believe that the same person was the minister of a whole dynasty of kings. In the same way the other compilers of the Codes may be found to be connected with the kings of some other states, India being divided into a number of small kingdoms in early times, in the same way as ancient Greece.

[1] Jaimini's Mímánsá, 6, 7, 2; See Transactions of the Royal Asiatic Socioty, Vol. I p. 456.

[2] Nárada-Smríti, Seventeenth Topic, verse 48.

[3] Yájnavalkya, 1, 2.

**Different Codes progressive.**—On an examination and comparison of the civil law as contained in the different Institutes you will find that although the ground-work is the same, still there is divergence on many points showing either the diversity of customs and usages in different localities, or a change and development of law in the course of time. Take for instance the law of inheritance: in the earlier times inheritance was confined to the members of the same family, and we have seen that women were excluded from inheritance; it follows therefore that persons belonging to a different family but related through a female would not be in a better position than she, and consequently excluded like her. Accordingly Manu's Code which appears to be the earliest, does not recognize the heritable right of cognates at all; and as regards females, the mother and paternal grandmother only are admitted to be entitled to the heritage. The cognates are included in the category of heirs by Yájnavalkya, who assigns them the lowest position in the order of succession, they being entitled only in default of members of the same gotra or family; and the lawfully wedded wife and the daughter are also recognized by the same sage to have the right of inheritance. The other sages take the one or the other, or even a less favourable, view so far as women are concerned, but none carry the law further in the direction of progress. The commentators of the Mitákshara School have under colour of interpretation, modified the law to this extent only that they have given a higher position in the order of succession to the daughter's son, a cognate; while the Dáyabhága school has only introduced and shuffled in amongst the agnates, a few other nearer cognates upon the novel theory of the capacity for conferring spiritual benefit being the principle of the order of succession, invented for the very purpose of changing the law under the pretext of interpreting the same.

**Slowness of progress, its causes and contrast with Roman law.**—A review of the whole course of legal literature of the Hindus, on the important subject of inheritance, from the earliest to the recent times embracing a period of several thousands of years, establishes that the Hindu jurisprudence made very slow and slight progress, in comparison with another ancient system, which though extending over a considerably shorter period made vast strides towards the development and perfection of juridical notions and furnished the basis upon which the modern European nations have moulded their jurisprudence. The Roman law also did not at first recognize the heritable rights of the cognates, and of the wife if not in *manu*. But in the course of time the Prætor Urbanus recognized the heritable right of the cognates under the pretext of giving them forms of Action; but assigned them an inferior position in the order of succession. Later on all distinctions between agnates and cognates and between males and females, were abolished by Justinian,—a stage of development which Hindu law has not reached. The Roman people, whose customs

and usages at the earliest stage bore a very close resemblance to those of the Hindus, and the course of whose civilization though running parallel to that of the Hindus up to a certain stage, took a divergent course by reason of the difference of the circumstances in which they were placed,—have bequeathed a system of jurisprudence that has exercised the most wholesome effect on modern systems of law. Their contact with other nations more or less civilized than themselves, brought under their subjection by conquest, whose laws and usages were different from their own; the necessity, they were under, of studying them for administering justice in the conquered states; as well as the difficulty that presented itself when the laws of the litigant parties were different,—combined in widening the field of their knowledge, in inspiring breadth of view, in perfecting juridical conceptions and in enabling them to systematize jurisprudence in the matured state they have left it. The Bráhmans on the other hand adopted and taught the religious principle of asceticism inconsistent with worldly prosperity and political greatness, established a caste system causing an exclusiveness that prevents the introduction of a stranger into the Hindu community, and thus rendered themselves incapable of deriving any advantage from the observation of the laws of other people whom they were interested to despise and hold up to contempt. Bráhmanism, caste-system and Bráhmanical superiority are convertible terms, and people without caste could not but be looked upon by the Bráhmanas, with derision at least externally, and represented as mlechchhas or barbarous, or irreligious. Nor were the Hindus placed in a close contact with any foreign people having different customs, usages and manners until the Mahomedan conquest, the previous invasion of India by Alexander and others having been events of temporary interest only. The internecine wars and controversy caused by the rise of Buddhism were not likely to have any effect on jurisprudence, or rather on the customary law of the people, the religious doctrines propagated by Sákya Sinha being directed simply against the pretensions of the Bráhmanas to an inherent superiority, and their theory of the origin of the Sástras. The greatest impediment in the way of progress of Hindu jurisprudence was offered by the theory of its divine origin, which stamped a stationary character upon it.

**Effect of Mahomedan conquest on Bráhmanical mind, its religious turn.**—The Mahomedan conquest and government of India created a deep impression on the Bráhmanical mind and gave a rude shock to its notion of the divine constitution of Hindu society. It appears to have produced two somewhat opposite results influencing the Bráhmanical mind to think in divergent directions. It taught them the fundamental distinction between law and religion, but at the same time it had the inevitable result in compelling the Bráhmanas to be more religious than ever. It produced one result on the minds of the Bráhmana lawyers of those portions of India that were not yet subjugated

by the Mahomedans, and a different result on those residing in the provinces where the Mahomedan government had been established. It should be borne in mind that under the Hindu kings the Bráhmanas were the repositories and expounders of laws; and the administration of justice was chiefly, if not exclusively, entrusted to them. The Mahomedan rule deprived them of the proud political position previously occupied by them. Consistently with the dictates of the Sástras they could not seek the favours of the Mahomedan rulers, associate with them and take any part in the government of the country, and at the same time retain their own position in Hindu society. Keenly alive to the interests of their own religion and of their class, which would have very materially been endangered in the eye of Hindu society had they taken the false step of seeking worldly prosperity and political position, they adopted the proper course of severing their connection with, and of withdrawing from, the political government of the country, and chose to retain their position of religious and social supremacy among Hindu community. Thenceforth they devoted their undivided attention to religious matters, ceased to be practical lawyers and became more narrow-minded than ever. The worship of the various idols and the innumerable religious ceremonies mentioned in the Puránas were thrust into prominence by the Bráhmanical writers of this period, such as Bhavadeva, Raghunandana, Kamálákara and Nilakantha, who busied themselves in preparing elaborate works for teaching the members of their class, the method of performing the religious rites, so that they might earn their livelihood by officiating at them. The Bráhmanas appear to have been divided into two classes from before, namely, the secular and the spiritual, or in other words, Bráhmanas by birth and Bráhmanas by qualification; the latter of whom were devoted to the cultivation of the sacred literature and learning, as well as to the teaching of religion and the performance of religious ceremonies as officiating priests. This class was characterized by the simplicity of their lives, and by a spirit of independence that arose from contentment with the bare necessaries of life; and in this way they succeeded in maintaining their position in Hindu society.

**Commentaries.**—All the commentaries on Hindu law that are now extant were composed after the conquest of India by Mahomedans had commenced, but the Mitákshará and the Dáyabhága the two leading treatises of paramount authority appear to have been written at the request or under the patronage of reigning Hindu kings. The view of secular law, taken by the commentators illustrates the wholesome influence exerted by the contact of one nation with another.

**Conflict of law, and its reconciliation.**—The commentators profess to explain the law contained in all the Codes which are accepted to be equally authoritative upon the theory of their origin. I have already observed that they do not

lay down the self-same rules, there is therefore a conflict of law, which is admitted by some of the Codes themselves containing rules for reconciling conflicting texts, though such an admission is inconsistent with the theory of their divine origin. Manu says :—"But when there is a conflict between two texts of Sruti, both are held to be law; for both are pronounced by the wise to be perfectly lawful."[1] Yájnavalkya ordains,—"But in the case of a conflict between two passages of Smriti, what is reasonable according to usage shall prevail."[2] Another rule runs thus :—"If two texts of Sruti or two texts of Smriti be inconsistent with each other, they are to be presumed to refer to different cases; but if there be a conflict between a Sruti and a Smriti, the Sruti alone must prevail." And Vyása declares,—"Where a conflict is found between Sruti, Smriti and Puránas, there the Sruti is to be accepted as most authoritative; and in case of a conflict between the latter two, the Smriti must prevail."[3] With respect to civil law, cases of conflict between Sruti and Smriti are very rare, regard being had to the fact that the former does not deal with this branch of law. I have already told you that a rule of law may be inferred from Vedik passages: and in such a case very great weight is attached to it; as an instance of this, I may mention that Nanda Pandita is constrained to concede the adoption of a son by a man having a real legitimate son, by reason of there being a Vedik precedent.[4] But there is another instance in which the scope of a Vedik rule is curtailed by passages of Smriti to a contrary effect. I have already referred to a Vedik passage cited by Báudháyana, which declares the incompetency of women to inherit; but there are many texts of Smriti recognizing the heritable right of the widow, the daughter, the mother and the paternal grandmother. And the commentators, instead of following the rule respecting the relative authority of the Sruti and the Smriti, reconcile the above conflict by holding that the Vedik text refers to women other than those expressly enumerated by the Smritis in the category of heirs. They appear to consider the special rules contained in the Smriti texts which are presumed to be grounded on revelation, to be of sufficient authority to control the operation of the general rule laid down in the passage of the Veda. Conflicts between texts of the different Codes, however, are often found; and the commentators endeavour to interpret them so as to make them agree with one another, but where every description of device and ingenuity fails to achieve that purpose they try to reconcile them agreeably to the above rule by supposing different cases or circumstances to which they are respectively applicable. Thus, for instance, there is a great divergence of opinion amongst the different lawgivers with respect to inheritance and order of succession; some of the

[1] Manu, II, 14.
[2] Yájnavalkya, II, 21.
[3] Vyása-Smriti, I, 4.
[4] Dáttáka-Mímánsa, I, 12.

assign the foremost position to the widow in the order of succession to the estate left by a man dying without male issue, while others are not so favourable to her claim and either ignore or postpone her heritable right. The Mítákshará reconciles them by holding that the rules unfavourable to the widow apply to the undivided coparcenary interest of a member of a joint or re-united family, and the others recognizing her superior claim refer to the divided or separate estate of her husband. The Dáyabhága also reconciles them on the same principle but in a quite different way, the doctrine of survivorship being not recognized by its author: he reconciles these conflicting texts in a way already referred to, he maintains that the passages ignoring the widow's right of inheritance do not refer to the *patní* or lawfully wedded-wife, but to such a wife that cannot come under the definition of *patní;* and that those passages that seem to postpone her rights, do not intend to lay down the order of succession but simply enumerate the relations that may become heirs.

**Positive law not within scope of Sástras, and classification of rules properly within it.**—The Sástras or the sacred literature should properly speaking contain simply rules of conduct for the guidance of man; but they do deal with matters that are not so, but are statements of facts perceptible by the senses or mere narratives, from which no rule could be deduced. With a view to determine the province of revelation, matters treated in the Sástras have been divided by writers discussing sacred literature into several classes. The proper object of the Sástras, according to them, is to teach of things that lie beyond the scope of human perception and reason. What men would do or refrain from doing of their own accord from purely human motives, need not be laid down in the Sástras. Where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called, an *utpatti vidhi* or injunction. When a precept forbids men to do what they may do under the natural impulses, it is called a *nishedha* or prohibition. But a precept regarding what men may or may not do, of their own accord, may come within the purview of the Sástras if it enjoins or forbids that act at a particular time or place or is directed to particular persons, such a precept is called *niyama* or restriction. There is another kind of precept called *parisankhyá* which, so far as its form is concerned, cannot come within the proper scope of the Sástras, but which may by implication suggest a rule that may properly be laid down in the Sástras. As for instance, "Man shall eat the flesh of the five clawed animals." This cannot be an *utpatti vidhi*, for men may do the same of their own accord; nor can it be a *niyama*, as no time or place or person is specified when or where or by whom the precept is to be complied with. But it may be construed to imply that man shall not eat the flesh of any other clawed animal than the five specified ones; and it is construed to intend the prohibition so that it may not be considered to be useless. When the

Sástras lay down a precept which is neither an *utpatti vidhi*, nor a *nishedha* nor a *niyama* nor a *parisankhyá*, or a precept which embodies any such rule when it has already been declared in another precept or, may be deduced from another precept, it is called an *anuváda* or 'recital'[1] or superfluous precept that need not have been laid down in the Sástras. Rules again that may otherwise be deducible, are included in the category of *anuváda*, if contained in the Sástras.

**Mitákshará on this point.**—The commentators hold that the Sástras in so far as they deal with 'litigation' or positive law, are generally *anuváda* or superfluous, 'reciting' or embodying rules that are not grounded upon the sacred authority of the Sástras, but are based on popular customs and usages depending upon the feelings of the community and its sense of utility or of right and wrong. Thus the Mítákshará in the course of a discussion relating to the purport of a text of Manu, remarks—"In this text there is no prohibition of what might otherwise take place; but it is a recital of that which is demonstratively true: for most texts, cited under this head, are mere (*anuvádas* or) recitals of that which is (*loka-siddha* or) notorious to the world."[2] The Víramitrodaya also, another commentary of the same school, explaining and supporting the doctrine of the Mítákshará, makes a similar observation while meeting an adverse argument, thus:—"For it is admitted by all the commentators that the sacred Institutes in so far as they deal with litigation or jurisprudence mainly consist of *anuvádas* or superfluous precepts embodying matters derived from profane authority"[3] of human reason and so forth. Thus the commentators introduce an advanced view of jurisprudence and in a manner modify, if not give up, the theory of the divine origin of positive law; for, according to their view, even if there had been no revealed law, the same rules would have been recognized by the people. And these lawyers explain the reason why positive laws have been incorporated in the Codes, by saying that they were intended to guard the unthinking from falling into error.[4]

**Its advanced ideas, division of rules into mandatory and directory.**—Again in the opening Section of the Chapter on inheritance, the Mítákshará enters into a lengthy disquisition as to the origin of the institution of property.[5] There are several texts in the Smritis relating to the lawful modes of acquisition of property: Gautama prescribes the different modes of acquiring owner-

[1] Colebrooke in his translation of the Mítákshará and the Dáyabhága, uses the wor recite or recital where *anuváda* has been used in the original.

[2] Colebrooke's Mítákshará, I, 4, 14.

[3] Translation, page 20.

[4] Colebrooke's Mit., 1, 1, 14; Víramitrodaya, Translation, ch.. I, § 37, page 19.

[5] Colebrooke's Mítákshará, 1, 1, 6-15.

ship, of which some are declared common to all the castes, and others peculiar to one or more of them ;[1] and Manu also lays down that there are seven modes for acquiring property.[2] There are again passages in the Codes declaring it unlawful for a Bráhmana to acquire property by a blameable act. And from these texts it is contended that the institution of property, owes its origin to the sacred Institutes. But the Mítákshará refutes the argument, and concludes that the notion of property is entirely based upon the profane authority of popular recognition and practice.[3] One of the reasons assigned for that conclusion is worthy of special notice; it is argued that the theory of the notion of property being founded upon the sacred institutes cannot reasonably be maintained, because the institution of property is seen among inhabitants of Mlechcha or barbarous countries, who are ignorant of the rules of the sacred Codes, bearing on that subject. This illustrates the salutary influence exerted on the advancement of man, by the close contact of different nations with one another. The view taken by the Mítákshará on the subject of property is, that it may be acquired in the modes recognized by popular practice; and as regards the restrictions laid down in the passages of law, they are intended for spiritual purposes, that is, a man acquiring property in contravention of the restrictions imposed by the Sástras incurs sin, but his ownership therein arises, if the means of acquisition is lawful according to popular practice. And the Mítákshará goes so far as to maintain that even a religious ceremony performed with wealth acquired in contravention of the rules propounded by the Sástras is not on that account vitiated; the person performing it, is entitled to the religious merit flowing from it, though he may be tainted with demerit on account of his gaining the wealth in an improper mode.[4] Thus you will observe that the rules laid down by the Institutes while dealing with jurisprudence are not all obligatory in a legal point of view; some are considered to be of mere religious obligation. The commentators of both the Schools draw a distinction between rules of legal and of moral obligation: the well-known doctrine of *factum valet* which is by some erroneously considered to be peculiar to the Dáyabhága school, is only an exposition given in that treatise of the most important principle for distinguishing rules that are merely directory or recommendatory from those that are imperative or mandatory. The commentators also have not always kept in view the distinction, but have often blended together rules of different kinds without intimating their nature and character, and have thus left to our Courts of justice the somewhat difficult task of

[1] Gautama, X, 39-42; cited in Mítákshará, 1, 1, 8.

[2] Manu, X, 115; cited in Mít., 1, 1. 16.

[3] Mítákshará, 1, 1, 9.

[4] Colebrooke's Mítákshará, 1, 1, 10.

differentiating between them. The subject is of very great importance, and I shall deal with it at length in a subsequent lecture.

**Sacred law and popular feelings.**—Another principle of very great importance is enunciated by the Mítákshará, namely, that popular prejudice or change of usage overrides a rule of law laid down in the sacred Institutes. In dealing with the subject of partition after the father's decease, the Mítákshará notices several passages of law ordaining unequal distribution of property amongst brothers and allotting a larger share to elder brothers;[1] but it explains them away thus:—True, this unequal division is found in the sacred ordinances; but it must not be practised, because it is abhorred by the world; since that is forbidden by the maxim—"Practise not that which though legal is abhorred by the world, for it secures not celestial bliss:" just as the practice of offering bulls is shunned, on account of popular prejudice, notwithstanding the injunction "Offer to a learned guest a bull or a large goat;" and as the slaying of a cow is for the same reason disused, notwithstanding the precept "Slay a barren cow as a victim consecrated to Mitra and Varuna."[2]—And in support of this view, is cited the following passage of Smriti-Sangraha,—"As the duty of appointment to raise issue, and as the slaying of a cow for a victim, are now disused, so is partition with deductions in favour of elder brothers."[3] The author of the Dáyabhága, also, while dealing with the same subject refers to usage and to altered state of feelings, as the ground for maintaining equal distribution of patrimony amongst brothers.[4] It should, however, be observed that what is maintained by both the leading Treatises is, that unequal distribution cannot be enforced as a matter of legal obligation, but parties concerned are not prevented from making an unequal partition if they agree to do so.[5]

**Mítákshará and Dáyabhága not speculative.**—The above principle laid down by the Mítákshará, and impliedly adopted and followed by the Dáyabhága, as well as the manner in which the point for consideration has been dealt with by them, deserve special attention, as showing that the authors of the two leading treatises did not give merely theoretical exposition of the law such as is contained in the sacred Institutes but also noticed the change, if any, in the state of society, requiring the modification of any rule of law: their treatises were not speculative, but practical commentaries on law. It follows therefore that if we find that these commentators dealt with any branch of law intimately

[1] Colebrooke's Mítákshará, 1, 3, 3.
[2] Colebrooke's Mítákshará, 1, 3, 4.
[3] *Ibid*, 1, 3, 5.
[4] Dáyabhága, 3, 2, 27.
[5] Dáyabhága, 3, 2, 26.

connected with social usages, without noticing any change in them, we shall be perfectly justified in assuming from their silence, that the usages did continue to exist at the time they flourished.

**Mítákshará on sonship.**—With these preliminary observations let us proceed to examine how the law of sonship has been dealt with in the commentaries of Hindu law. Of these the Mítákshará occupies the pre-eminent position and is universally accepted as a work of the highest authority by all the schools except that of Bengal where it yields to the Dáyabhága on those points in which they differ. It professes to be a commentary on the Institutes of Yájnavalkya; but you must not suppose that the commentator confines his attention only to that Code and merely gives an exposition of the law such as is contained in it. For what he really does is that he follows the arrangement of the subjects as in Yájnavalkya's Code, but that while interpreting the text of it, he notices passages of Manu and other sages dealing with the same subject, reconciles them when they are at variance with one another, and deduces rules of law from a consideration of the different Codes that are noticed; so that the law laid down in the Mítákshará is not based upon Yáynavalkya's Institutes alone, but may be set forth as a body of rules deducible from the sacred Codes that are accepted as the sources of law. With regard to the subject of sonship, the Mítákshára, first of all, deals with the circumstances in which a wife's son becomes Dvyámushyáyana or son of two fathers, that is to say, of the begetter and of the husband;[1] and then goes on to explain the text of Yájnavalkya describing the twelve descriptions of sons, and in doing so, it refers to rules laid down by other sages. After having described them, the author discusses their rank and relative rights, their status in the adoptive family, and their right of inheritance from their legal father and his relations.[2] Thus it appears that all the twelve kinds of sons were recognized; and there is not a word said in this part of the work, about any one description being obsolete or prohibited. But I have already drawn your attention to a passage[3] in which the duty of appointment to raise issue is represented as being disused. That, however, appears to relate to compulsory appointment of a widow to raise offspring to her sonless deceased husband. For the view which is put forward by Dháreswara who appears to have been accepted as an authority before the Mítákshará, of the widow's right to inherit the estate of her husband dying without male issue, was that she could succeed to her separated husband provided she were willing to accept the appointment to raise up issue to her husband, but not independently of that consideration.[4] The Mítákshará,

[1] Colebrooke's Mítákshará, 1, 10.

[2] Colebrooke's Mítákshará, 1, 11.

[3] Colebrooke's Mítákshará, 1, 3, 5.

[4] Colebrooke's Mítákshará, 2, 1, 8, *et seq.*

however, refutes this position; but the course of the argument advanced by it[1] shows that the usage did exist at the time, the work was composed.

**Mithilá School.**—The commentators of the Mithilá School or rather the Mithilá branch of the Mítákshará School, also, deal with the law on the subject of sonship without noticing any change of the early usages recorded in the Institutes. Mithilá or Tírabhukti (modern Tirhoot) was a great centre of learning from the earliest times down to the latest period of the Hindu kings. It was here that Yájnavalkya flourished and taught his Institutes, to which the greatest respect is paid by the Mítákshará school: and the Bráhmanas of Bengal originally used to resort to that seat of learning for education before Nadiya, and later on Vikrampur, in lower Bengal, became celebrated centres of learning.

**Vivádа-Ratnákara of Chandesvara, on sonship.**—One of the principal works on law, respected in that school is the Vivádа-Ratnákara compiled by Chandesvara the minister of Harasinha Deva a king of Mithilá. He appears to have flourished in the beginning of the fourteenth century, as in the peroration of the work, he says that he had performed the ceremony of Tulá-púrusha or the distribution of his own weight of gold amongst Bráhmanas, in the year 1238 of the Saka era, which corresponds to 1315 A. D. The work does not profess to be a commentary on any particular Code, but is a regular digest of the law. The author deals with the subject of sonship in eighteen consecutive parts of his treatise.[2] I have already told you that sonship is treated by the sages as part of the law of inheritance; the same method is followed also by the commentators. Accordingly the author introduces the subject by discussing the relative rights of inheritance, of the different descriptions of sons; then defines separately thirteen kinds of sons including the son by a Sudra wife, as one; next discusses the circumstances under which a wife's son belongs to the husband or to the progenitor or to both; then considers the effect of the texts declaring sonship of a fraternal nephew and the co-wife's son; next, notices the passages laudatory of the spiritual efficacy of the possession of a son; and lastly, deals with the subject of 'censured sons.' But all that he says under this concluding part, is that a son brought forth by a widow not duly appointed, is not entitled to the estate of the woman's husband, and that a son begotten by one man on another's wife belongs to his natural father if he paid the Sulka or price to the husband. Thus we find that all the twelve descriptions of sons were recognized at that time, and if there were any alteration in respect of the usages relating to sonship, we should expect it to be noticed by the author who from his position

[1] Colebrooke's Mítákshará, 2, 1, 15-19.

[2] Vivádа-Ratnákara, Bengal Asiatic Society's Sanskrit edition, pages 541-588.

as the minister of a reigning king was likely to be informed of the actual state of society.

**Viváda-Chintámani of Váchaspati Misra on the same.**—The Viváda-Chintámani is a later commentary of the same school, composed by Váchaspati Misra a Pandita of varied learning. The want of English version of an original treatise accepted as authoritative by the Mithilá school had been long felt, and was at last supplied by an eminent Indian lawyer who spared no pains to master the law literature of his own country, and took so much interest for the promotion and advancement of legal learning as to make the princely gift to found this chair for the cultivation of Indian law. The Viváda-Chintámani being the later work and as such embodying the essence of the earlier treatises was selected by him for translation. In this commentary also, all the different kinds of sons are recognized without a single exception. The author cites the texts of Yama, Nárada, Manu, Baudháyana, Devala, Vishnu and Yájnavalkya, relating to the twelve descriptions of sons ;[1] discusses their rights of inheritance and relative position ; and endeavours to reconcile the almost irreconcileable rules propounded by the different sages in respect of the rights of several kinds of sons, by supposing the superiority and the inferiority assigned by different sages to the same description of son to be due to his possession or otherwise of excellent qualities.[2] In another part of the work, he deals with the propriety of the gift of a son and of an only son, and with the power of a woman to adopt.[3] But the author does not anywhere in this work intimate that any part of the early usages of sonship was obsolete at his time; so we may be justified in concluding from the tenor of the work that the usages did exist in its entirety.

**Dáyabhága.**—Let us now turn to the commentaries of the Bengal school, and see how the law on the subject under discussion has been dealt with in them. Jímútaváhana, the author of the Dáyabhaga, is the founder of this School which appears to be far in advance of the other schools as regards the development of legal ideas relating to inheritance, that Hindu law ever attained. The precise age at which this celebrated commentator flourished is entirely uncertain ; but it appears to be beyond any doubt that it cannot be later than the thirteenth century. He appears to refute the doctrines propounded by the Mítákshará without, however, mentioning the name of that treatise or of its author. Regard being had to the practice of the Hindu Panditas, this circumstance may justify the supposition that he was either a contemporary of, or not much later than a century from, Vijnánesvara the author of the Mítákshará. From a comparison of the legal views contained in the two treatises, student of comparative jurisprudence would feel no hesitation in pronouncing

[1] See Lecture II, pages 60—64.

[2] P. C. Tagore's Viváda-Chintámani, pages 278-288 ; (Madras Edition).

[3] *Ibid.*, pages 72-75.

the Dáyabhága to be a later work than the Mítákshará; the juridical notions by which the former is distinguished from the latter, mark a later stage of development in the growth of legal conceptions. One of the learned predecessors in this office is inclined to fix the beginning of the fifteenth century as the age of Jímútaváhana.[1] But it is open to the criticism that had he been so much later in point of time than Vijnánesvara he would have no objection to mention the name of Vijnánesvara or his work, whose doctrines, he is universally admitted to refute. The Dáyabhága is not, like the Mítákshará, a commentary on any particular Institutes, but it is a digest of the law of inheritance, such as is, according to its author, laid down in the Institutes of Manu and other sages.

**It recognizes twelve kinds of sons.**—The Dáyabhága treats of the subject of sonship in the same manner as the commentaries mentioned above.[2] He opens the subject with a discussion of the relative rights of a real legitimate son and an appointed daughter; and then proceeds to discuss the rights of the subsidiary sons in competition with a real legitimate son. He cites the text of Devala, declaring the right of a subsidiary son to a third share when co-existing with an *aurasa* son, and two conflicting passages from Manu one of which gives to the Kshetraja son a sixth or a fifth share, and the other declares the real legitimate son to be entitled to the entire patrimony to the exclusion of the secondary sons who are entitled to maintenance only; and reconciles these rules by holding them to relate respectively to the superiority or inferiority of the caste of the subsidiary sons, in comparison with that of the father and of the real legitimate son. He also notices the distinction between the twelve sons, based upon the right of inheritance from the father alone, and that from him as well as his relations; and concludes by laying down the rule of distribution between a true son and the son of the wife produced without due authority. I give you these particulars because they clearly show that the usage of twelve descriptions of sons was fully recognized when the author flourished.

**The Smriti-tattva of Raghunandana Bhattácháryya** who is sometimes cited as Smárta-Bhattácháryya, is another work respected as authority in Bengal. Its author appears to have flourished in the middle of the sixteenth century.[3] This treatise, also called the Astávinsati-tattva, by reason of its being divided into twenty-eight books, deals mainly, with ritual. One of the books, called Dáyatattva, however, treats of the substantive law of inheritance. The book is an abridgement of the doctrines of Jímútaváhana and is an excellent compendium of his treatise, although on a few point Raghunandana has differed from his master. But as regards the twelv

[1] Sarvádhkári's Tagore Lectures, pages, 400-403.

[2] Dáyabhága, ch. X.

[3] See Colebrooke's Preface to his Translation of Mítákshará and Dáyabhága.

descriptions of sons he appears to follow the founder of the school without any indication of dissent. He refers to the texts of Devala and Manu respecting the relative rights of the twelve kinds of sons,[1] and adopts some of the rules laid down in the Dáyabhága. But it ought to be mentioned here that this commentator while dealing with marriage, says that the intermarriage between the four different tribes should be avoided in this Kali age, and in support of this view he cites two passages from two minor Puránas, namely, Vrihan-náradíya Purána, and Áditya Purána, enumerating practices that are to be shunned in this age; one of them being, the having of sons other than the real legitimate son and the Dattaka son. These passages are interesting and useful in many respects, and so I give them here in *extenso*.

**Vrihán-náradíya Purána on practices to be shunned in the Kali age.**—The passage of the Vrihán-náradíya Purána runs as follows:—"The passing of the sea in a ship; the necessity of carrying a waterpot; the marriage of a twice-born man with damsels not of the same class; the procreation of a son by a man on the widow of his brother; the slaughter of cattle in the entertainment of a guest; the repast on flesh meat at funeral obsequies; the adoption of the third order of life, or the retirement to a forest; the gift of a damsel already given, to another bridegroom over again; the continuance of studentship for a very long time; the human sacrifice; the horse sacrifice; walking on a pilgrimage with intent to die; and the slaughter of a cow as a victim at a sacrifice: the wise declare that these practices though lawful should be avoided in the Kali age."

**Á'ditya-Purána on the same.**—The extract from the Áditya Purána, which Raghunandana quotes from Hemádri and the Parásara-Bháshya, stands thus:—"Studentship continued for a very long period; the necessity of carrying a waterpot; the procreation of a son by the husband's brother; the gift in marriage of a damsel once married; the marriage by the twice-born men of damsels belonging to a different *varna* or tribe; the killing in self-defence of a Bráhmana in a lawful fight; the adoption of the third order, or retirement to a forest, though enjoined by law; the reduction of the period of pollution, by reason of the virtuous conduct or the scriptural learning of a person; the performance of expiation by a Bráhmana, extending to death; the pollution arising from association with sinful men; the slaughter of cattle in honour of eminent guests; the having sons other than the *aurasa* or real legitimate son and the *dattaka* or given son; the eating by a twice-born householder, of food iven by the following men of the Sudra class, namely, a slave, a cowherd, family friend, and a cultivating servant remunerated by half the produce;[2] oing out on pilgrimage to a very distant place; the cooking by Sudras

[1] Dáyatattva, (Translation,) Ch. II, 37 and 38; page 17.

[2] See Manu, IV, 253.

of food for Bráhmanas and others; self-immolation by a fall from a precipice or by burning; suicide by a man of extreme old age, and others; *et cetera:* these lawful practices have been, with intent to protect the people, prohibited after deliberation by the learned in the beginning of the Kali age; and a resolution of the virtuous has as much legal force as a revelation."

**Víramitrodaya on sonship.**—Let us now turn to the other commentaries of the Mítákshará School to see how the law of sonship has been dealt with in them. Amongst these, the Víramitrodaya of Mitra Misra occupies a pre-eminent position; and has been held by the Privy Council to be a Treatise of high authority at Benares, and properly receivable as an exposition of what may have been left doubtful by the Mítákshará, and declaratory of the law of the Benares School.[1] The author was later than Raghunandana whom he cites, and appears to have flourished towards the close of the sixteenth or the beginning of the seventeenth century.[2] He deals with the subject of sonship in the same way as in the Mítákshará. He discusses the definitions of the twelve descriptions of sons more copiously, by citing texts of different sages, bearing on the subject; enters into the question of the widow's capacity to adopt; and deals with the status and heritable rights of the twelve kinds of sons.[3] Although the author in the course of his work refers to several commentaries in which the doctrine of the propriety of only two kinds of sons in the Kali age is maintained; yet he passes over that point in entire silence. But he makes a certain observation of an analogous though somewhat different character, while dealing with the subject of unequal distribution of paternal wealth amongst brothers. He maintains the same view as is put forward in the Mítákshará, and supports it in the same way, but sets forth an additional authority in favour of it. He argues that the practice is one which should be shunned in the Kali age; and in support of this proposition he quotes the following passage from the Ádi-purána one of the minor Puránas: "The remarriage of a woman once married, specific deductions for elder brothers, the slaughter of a cow, appointment on a brother's widow, and the necessity of carrying a waterpot (by a student:) these five should not be practised in the Kali age."[4] It should be observed that this passage specifies five practices only as being what should be avoided in this Kali age; and marks the origin of the theory, although gradually the list of the things to be shunned has been added to and enlarged. But what deserves particular notice is that although the author refers to the practices to be avoided in this age, yet he fully describes the twelve kinds of sons, and their rights and status, without mentioning

[1] Giridhari Lall Roy *v.* The Bengal Government, 12 Moore's I. A., p. 448.

[2] Sarvádhikari's Tagore Lecture, p., 404.

[3] Víramitrodaya, Ch. II, Pt. II, pp. 100-130.

[4] Víramitrodaya, translation, p. 61.

a word to intimate that any description of son has become obsolete or should not be recognized as being unsuitable to the present age.

**Kamalákara's Viváda-Tándava and Nirnaya-sindhu.**—Kamalákara Bhatta is another commentator of the Benares School; he is the author of the Nirnaya-sindhu a book on ritual, and of the Viváda-tándava a work on jurisprudence. He is considered as an authority by the Benares and the southern School, not so much in legal matters as in questions of ceremonial; where he occupies the same position as Raghunandana does in Bengal; and his work on ritual is extensively read by the priestly class of the North-West and the Marhatta country. Kamalákara is later than Raghunandana, whom he often cites in his work on ritual, and appears to have flourished in the beginning of the seventeenth century; for he himself states in the peroration of the Nirnaya-sindhu that it was finished in the year 1668 of the Sambat era which corresponds to 1612 A. D. The author deals with the subject of primary and secondary sons in his Vivádatándava,[1] and having explained their descriptions as given in Yájnavalkya's text, refers to the passage of the Áditya-purána cited by Hemádri, which says that sons, other than the real legitimate and the Dattaka should not be recognized in the Kali age. He admits the authority of this rule, but observes that as the appointed daughter's son is declared equal to the *aurasa* son, and as the purchased son, the self-given son and the son made are similar to the Dattaka son, these also are recognized in the Kali age, and in support of this conclusion, he refers to Vrihaspati's text[2] which condemns only the Kshetraja and the other sons by operation of law. According to this writer therefore, six descriptions of sons are recognized in the present age, namely, the real legitimate son, the appointed daughter's son, the Dattaka son, the son bought, the self-given son, and the Kritrima or son made; and he purports to discuss the relative rights of these. In his Nirnaya-sindhu also, he refers to that passage of the Áditya-purána, relating to the reduction of the number of sons in the Kali age, but he does not appear to take that passage literally, as recognizing two descriptions of sons only. He does, no doubt, observe, while enumerating the relations who are competent to perform the sráddha ceremony, that although the word son signifies any one of the twelve descriptions, yet in the Kali age it is to be confined to the Aurasa and the Dattaka only in consequence of the other kinds being prohibited by the Áditya-purána cited in Hemádri's work;[3] but he goes on to say that the eleven descriptions of subsidiary sons are competent to perform the exequial ceremonies, only in default of a real legitimate son, a son and great-grandson; and cites a different rule laid down in the

[1] Manuscript copy of Sanskrit College Library, pp. 122-128.

[2] Lecture ii, page 65.

[3] Nirnaya-Sindhu, Bombay Edition of 1883, p. 321.

Prithví-Chandrodaya, namely, that the culpable sons, such as the unmarried daughter's son, the secetly-born son of the wife, and the son of the twice-married woman are competent to perform the sráddha ceremony, also in default of the widow who is preferable to them in this respect.[1] Again when dealing with impurity occasioned by death or birth, he observes that in the case of the given, the purchased, the made and other sons, the period of pollution extends to three nights and not to ten days.[2] The manner in which the subject has been dealt with, shows that the matter was in an unsettled state. And this is exemplified by an inconsistency of the author, found in the Viváda-Tándava; he says that he omits to consider the distribution of property amongst sons belonging to different tribes, upon the ground that marriage of a twice-born with a damsel of a different tribe has been prohibited by the Áditya-purána as cited in Hemádri's work,[3] but later on he discusses the rights of the son of a twice-born by a Sudra wife.[4]

**Nanda-Pandita's Kesava-Vaijayantí.**—Another distinguished writer who flourished in Benares at about the same time, was Nanda Pandita, who is famous as the commentator of the Institutes of Vishnu, and as the author of the Dattaka-Mímánsá the well known Treatise on Adoption. But the law of adoption has been dealt with so differently in the two works, that a doubt might very well arise as to the identity of their authors, if it were not otherwise established. I shall at present confine my remarks to his commentary on the Code of Vishnu, denominated Kesava-Vaijayantí, which according to his own account, was composed in Sambat 1679, corresponding with 1623 A. D. While commenting on the fifteenth chapter of the Code, which deals with the law of sonship, he gives a full and elaborate exposition of the twelve descriptions of sons and their rights, by citing texts from other Codes, bearing on the subject, and reconciling them when conflicting. So that it can by no means be contended that his work is a mere speculative gloss on the text of Vishnu's Code; but on the contrary it appears to be a regular digest of law, though mainly based upon that particular code which it purports to elucidate, in so far as the arrangement of the subjects dealt with, is concerned. The author does nowhere intimate that any portion of the ancient usages of sonship has ceased to be recognized at his time. And, from the manner in which the twelve kinds of sons have been described and their relative rights discussed, it is impossible for the reader to believe that the law as understood at the time the writer flourished, did not recognize ten out of the twelve descriptions of sons, whose status has been so minutely discussed by him. It appears to be exceeding

[1] Nirnaya-Sindhu, Bombay Edition of 1883, p. 324.

[2] *Ibid*, p. 452.

[3] Viváda-Tándava, Sanskrit College manuscript copy, p. 122.

[4] *Ibid.*, p. 129.

strange that the author does not in this commentary make any allusion whatever to those somewhat novel rules that he professes to deduce from certain minor Codes of law, in his treatise on adoption. This commentary was composed under the patronage of Kesava *alias* Tammasá Náyaka a king of Karnáta (modern Canara) in the Deccan. The author does not appear to have been a practical lawyer or administrator of justice, but he was a distinguished Pandita of Benares, patronized by the prince after whom the commentary was called.

**His Dattaka-Mímánsá.**—The Dattaka-Mímánsa of Nanda Pandita is a later composition than his commentary on Vishnu's Code[1]; and the author seems to have become wiser when he compiled that special treatise on adoption, as it contains rules and restrictions that had never been thought of by any lawyer that flourished before, nor even by himself when writing the Vaijayantí. With respect to the twelve kinds of sons, he says[2] that although in default of male issue eleven descriptions of substitutes were ordained by ancient law, yet in this Kali age only the *aurasa* and the *dattaka* sons are recognized; because, says he, Vrihaspati declares that the powerless people of modern times are incompetent to affiliate the divers descriptions of sons like the ancient sages, and because Saunaka forbids other sons than the *aurasa* and the *dattaka* in the text,—"The recognition of sons other than the *datta* and *aurasa*." But he adds that the word *datta* in Saunaka's text is to be understood to include the Kritrima also, because Parásara, who proposes to lay down the law for the Kali age, ordains—"Sons are *aurasa*, *kshetraja*, *datta* and *kritrima*." This text does, however, clearly recognize Kshetraja or the appointed wife's son; but Nanda Pandita, in his usual way of putting forward constructions supporting his foregone conclusions, maintains that the word *kshetraja* in the above text is intended as an epithet of *aurasa*. You will observe that he does not rely upon the passage of the Áditya-purána, which is not even referred to by him, but he bases his conclusion upon an exactly similar rule couched in the same words, which is attributed by him to Saunaka, who is supposed to be the compiler of a Smriti or a body of revealed law, called after him. Although Nanda Pandita appears to recognize in the opening section of his work, only three descriptions of sons, namely, the *aurasa*, the *dattaka*, and the *kritrima*; yet later on, he deals with the son of a twice-married woman in the same manner as if he is one of the descriptions recognized in the age about which he is writing.[3] This discloses that the novel theory regarding sonship in the Kali age was different from practice, and the author was unconsciously betrayed into the inconsistency of dealing with an usage which existed in society, but which was attempted to be ignored.

[1] Dattaka-Mímánsá, vii, 29.

[2] Dattaka-Mímánsá, I, 64-68.

[3] Dattaka-Mímánsá, IV, 64-74.

**The institutes of Parásara**—is considered to be of the highest authority in this Kali age; but it treats of only Áchára and Práyaschitta, or rules relating to ceremonies and penance, and does not deal with jurisprudence at all. I have already told you that the sages deal with the subject of sonship as part of inheritance which is entirely omitted in this work. There are, however, a few passages in which some descriptions of sons are incidentally alluded to, one of which has been cited by Nanda Pandita. All these passages may be usefully cited here, since they show that Nanda Pandita has discussed the subject more like a special pleader than a fair commentator:—"If seeds be carried either by a stream or by wind unto the soil of a person's field, and a crop is yielded by the field so sown, the crop will belong to the owner of the soil, not to the person who owned the seeds. Similar thereto are the two descriptions of bastard sons, both begotten on another's wife; they pass by the names of Kunda and Golaka. The bastard is a Kunda, if the woman's husband lives; it is Golaka if begotten after his death. A son is either an *aurasa* or son of the body; or a *kshetraja* or the appointed wife's son; or a *datta* or one obtained by gift; or a *kritrima* or son made. If either the father or the mother gives, the same is called a given son."[1] There cannot be any doubt on perusing these texts together, that the sage does recognize the Kshetraja or appointed wife's son. Further on, he clearly appears to sanction also the Paunarbhava or the twice-married woman's son in the Kali age, in the following text:—"When her husband is missing, or is dead, or has renounced the world, or is impotent, or has been degraded by sin,—on any of the said five calamities befalling a woman, law has ordained another husband for her"[2] Thus, although the sage does not profess to deal with the subject, yet conceding that he intended in the above passages to treat of the law of sonship in the Kali age, we find five kinds of sons recognized by him. You will bear in mind that he is one of the sages enumerated by Yájnavalkya as compilers of law. Yet it did not occur to the author of Mitákshará while dealing with sonship, that he had laid down any different rule for the present age.

**Madhavácharya's commentary on the same.**—Mádhavácharya, however, in his celebrated commentary on the Institutes of Parásara, called the Parásara-mádhava or the Parásara-bháshya, explains the first of the above texts as illustrative and indicating the twelve descriptions of sons enumerated by other sages;[3] and the second text recognizing the re-marriage of women as referring to other ages and not to the Kali age in which that practice is to be avoided according to a passage of the Ádi-purána cited

[1] Parásara-Smriti, IV, 20-22; See K. K. Bhattacharyya's Translation, p. 21.

[2] Parásara, IV, 28; See Translation, p. 22.

[3] Parásara-Mádhava, Asiatic Society's Sanskrit Edition, vol. II, p. 37.

by him.[1] This latter explanation appears to be quite inconsistent with the declared object of the Institutes of Parásara, for he professes to prescribe the laws suited for the Kali age.[2]

**Aparárka.**—The earliest work, noticing the text of Saunaka, sanctioning only two descriptions of sons for the present age, upon which the Dattaka-Mímánsa relies, is the commentary of Aparárka who appears to have been a king of Concan in the Deccan, and flourished in the twelvth century.[3] His work though cited by later commentators has not been accepted as special authority in any of the Schools. In his exposition of the law relating to sonship in this age, he follows the rule of Saunaka.

**Dattaka-chandriká and other works on adoption.**—The Dattaka-chandriká and other special treatises on adoption follow literally the authority of the passages recognizing two descriptions of sons only in the present age, and maintain that the Dattaka is the only secondary son that may now be affiliated.

**Vyavahára-Mayúkha of Nílakantha.**—Another writer of note who flourished in the seventeenth century was Bhatta Nílakantha belonging to a learned Bhatta family, the founder of which came from the Deccan and settled at Benares. He was the first cousin of Kamalákara the author of the Nirnaya-sindhu which I have already noticed. By command of Bhagavanta Deva a chief of Bundelkhund, Nílakantha composed a work called Bhagavad-Bháshkara after the name of his patron, consisting of twelve books named Mayúkha of which eleven are devoted to religious and ceremonial subjects, and one denominated Vyavahára Mayúkha deals with litigation or jurisprudence.[4] This writer does not appear to have been connected with the administration of justice, but a learned Sanskritist well-versed in the Institutes; and, like Raghunandana and Kamalákara was regarded as an authority not so much for the book on law as for the books on religious matters that were very useful to the Bráhmanas of the Mahomedan period. However, his Vyavahára-Mayúkha, came to be regarded as an authority concurrently with the Mitákshará, by the Maháráshtra Bráhmanas of the Bombay Presidency, the original seat of the family from which the author was descended. While dealing with the subject of sonship, he cites the text of Yájnavalkya describing the twelve kinds of sons and explains *aurasa*, *putrika-putra* and *kshetraja* sons, but adds that the secondary sons other than the *dattaka* are to be avoided in the Kali age, and then quotes without naming its author the passage prohibiting the recognition of sons other than the real

[1] Parásara-Mádhava, Asiatic Society's Sanskrit Edition, Vol. II, p. 45.

[2] Parásara-Smriti, ch. I, verses 2 and 24.

[3] See Sarvádhikari's Tagore Lectures, p. 381, *et. seq.*

[4] V. N. Mandlik's Hindu Law, Introduction, p. lxxiv, *et seq.*

legitimate and the dattaka or given, which may be ascribed either to Saunaka or to the Áditya-purána.[1] Having premised the subject in the above manner he goes on to consider at length the rules relating to the Dattaka or given son only. It may be observed here that this author does not appear to give effect to the prohibition of intermarriage between a man of a superior caste with a woman belonging to an inferior tribe, since he deals without any comment with the mode of partition among sons of the same person by his wives belonging to different tribes.[2] Hence it may be presumed that he did not accept the Áditya-purána as an authority upon matters therein declared to be unsuitable to the Kali age. But it is remarkable that a commentator of Hindu law, the principal sources of which are admittedly the Institutes of the sages, recognizing the twelve descriptions of sons, should maintain that only two kinds of sons are to be recognized in the Kali age, without setting forth the authority upon which this conclusion is founded, especially when it is opposed to the exposition of the law in the earlier commentaries composed in this very Kali age.

**Smriti-Chandriká.**—Let us now proceed to examine how the subject has been dealt with in the works that are regarded as authority by the Drávira School prevailing in the Madras Presidency. The foremost and the earliest of them is the Smriti-Chandriká of Devánanda Bhatta a work which is cited by most if not all of the later commentators, a fact evidencing that great respect was shown to it. The author appears to have flourished in the thirteenth century,[3] but very little of his life is known.[4] While dealing with the rights of the secondary sons, this author cites the texts of Manu describing them, offers some comments, and then adds: "The secondary sons thus described were all recognized as sons in other ages, in the Kali age the Dattaka alone is recognized: since by the passage—'The recognition of sons other than the *aurasa* and the *dattaka* (is a practice to be avoided in the Kali age,') —the sages did at the commencement of the Kali age prohibit the recognition of sons other than the real legitimate and the given son, for the purpose of preserving virtue. The appointment of a daughter to raise issue for her father is also prohibited by this very text, since an appointed daughter is different from an *aurasa* and a *dattaka*. Hence it is to be observed that in default of male issue of the body, the *dattaka* alone and no other may be a secondary son in the Kali age. There cannot, again, be a son of the body in the absence of a wife of the same class, for the espousal of a damsel of a different tribe is prohibited. Accordingly those versed in law have enumerated,—

[1] Mandlik's Vyavahára-Mayúkha, pp. 49-50.

[2] *Ibid.*, p. 46.

[3] Sarvádhikari's Tagore Lectures, pp. 387 *et seq.*

[4] Preface to Strange's Hindu Law, p. xv.

'marriage by a twice-born of a damsel belonging to a different tribe',—as one of the practices prohibited by the sages in the beginning of the Kali age. Hence we do not deal with the rules relating to the distribution of the heritage amongst sons by wives of different tribes, amongst secondary sons other than the *dattaka*, and amongst the appointed daughter and her son; as it would be objectionable to uselessly swell the volume of this work by treating of them, when the usages relating to them should not be followed in the present age." You will observe the unsatisfactory mode in which important innovations are sought to be introduced. The author does not tell us who these sages were that prescribed these rules which are to be followed, although they are admittedly opposed to the Smritis, nor does he furnish us with the evidence of the existence of such rules or the authoritative records of them. But he assumes them to be so well-known that a bare allusion to them is thought to be sufficient for their acceptance as of sufficient weight to supersede the law contained in the Codes. This seems to be a very strange way of writing a commentary on law, of which the Smritis are admitted to be the principal source.

**Vyavahára-Mádhava.** The Vyavahára-Mádhava is another work respected as authority in the Madras School. It is a treatise on jurisprudence by Madhavácharya who was the minister of three successive kings of Vijayanagara and flourished in the fourteenth century.[1] This work supplements his Parásara-bháshya or commentary on the Institutes oi Parásara which deals with only Áchara and Práyaschitta or ritual and penance. In the preface to these works, he styles himself सकल-पुराण-संहिता-प्रवर्तकः or the originator or compiler of the collections of all the Puránas. What he means to say is not very clear, probably he intends to intimate that it was through his exertion and influence that the Puránas were collected and invested with importance. And this appears to be quite correct, since it was from his times that the Puránas have come to be regarded as authority by subsequent writers. In his commentary on the Institutes of Parásara he has given publicity to the passages of the Áditya-Purána, enumerating the practices that are to be shunned in the Kali age.[2] In his treatise on law, he deals with the subject of subsidiary sons, as part of the Chapter on inheritance, describes them fully and their relative rights according to the texts of Yájnayalkya and other sages, but concludes[3] by saying that the law so explained prevailed in former ages and not in the present age in which secondary sons other than the *dattaka* are not recognized, because the usages relating to them are forbidden by a different Smriti as being fit to be shunned in the Kali age. In support of this view he cites the

[1] See Sarvadhikari's Tagore Lectures, p. 362, *et seq.*

[2] Parásara-Mádhava, Asiatic Society's Sanskrit Edition, voi., I, p. 123, *et seq.*

[3] Sanskrit College manuscript copy, leaf, 89.

following passages without naming their source:—"Recognition of sons other than the *dattaka* and the *aurasa*, procreation of a son by the husband's brother, the adoption of the order of retirement to a forest in the third stage of life: these practices are declared by the wise to be such as are to be shunned in the Kali age." These passages appear to be cited from the Vrihan-nárdiya and the Áditya Purána; and the author seems to assign to these Puránas the rank of Smriti, as it is upon their authority only, that the practices recognized by Manu and other compilers of the Dharma-Sástras are to be eschewed in this age. But this author appears to be inconsistent, as in the immediately preceding part of his work, he treats of the mode of distribution of heritage among sons by wives of different tribes, without a word as to whether this branch of law is applicable to the present age; intermarriage between a man and a woman belonging to different castes, being one of the practices forbidden by the said Puránas as being unsuitable for this age.

**Visvesvara Bhatta and Bálambhatta.**—Let us now see what Visvesvara Bhatta and Bálambhatta (or Lakshmí Devi who assumed that name) the two well-known commentators on the Mitákshará say on this point. The former in his commentary called Subodhiní, cites the passage prohibiting the filiation of sons other than the *dattaka* without naming its author, and referring to the twelve kinds of sons dealt with in the Mitákshará, observes that the author should have concluded the topic of sonship by saying that all these sons were recognized in former ages, and not in the present times in which the ancient usages are not all observed. The modern usages again in this respect, continues the commentator, differ materially from those observed in ancient times: all the laws prescribed by Manu are not in force in the Kali age. You will observe that this commentator does in a manner impute to the author of the Mitákshará a want of discrimination between existing and obsolete usages. But, we have already seen that the Mitákshará is not a speculative treatise, and cannot properly be charged with the above defect. Bálambhatta also, while explaining the same topic of the Mitákshará, remarks—"All this refers to other ages; but in the Kali age the *aurasa* and the *dattaka* only are recognized as sons, so also the *putriká* or appointed daughter who is similar to an *aurasa* son." And in support of this view relies upon the authority of Mádhava Áchárya who has given publicity to the passages of the Áditya-purána, relating to the practices that should be shunned in the present age, and cites the text prohibiting the filiation of secondary sons other than the Dattaka.

The position advanced by Visvesvara Bhatta that all the laws of Manu are not now in force, does not, however, appear to be assented to by many commentators who are regarded as authoritative. There were numerous commentaries on the Code of Manu, of which those of Medhátithi, Sarvajna-náráyana, Kullúka, Rághavánanda, Nandana, Ráma-

chandra and Govinda-rája are extant. None of them, however, admit that any part of the laws of Manu has ceased to be in force, nor do they notice any change in the usages ralating to sonship. All of them recognize the twelve descriptions of sons while explaining the passages of the ninth chapter, bearing on the subject of sonship. The laws of Manu are, as I have already told you, considered to be of paramount authority, and the author of the Dáyabhága appears to intimate that a rule of law contrary to Manu cannot be accepted as authoritative.[1]

**Divergence between commentators.**—I have noticed at considerable length the opinions of the numerous writers considered as commentators on Hindu law, and have set forth the manner in which they treat of the subject, with a view to give you an insight into the character of their works, the mode of their argument and the value to be attached to them. Upon a review of them it is clear that they are, so far as the present question is concerned, divisible into those that follow the law propounded in the Smritis and those that curtail the operation of that law upon the authority of Saunaka and the minor Puránas such as the Áditya-purána. The first class includes the commentaries that are now regarded as of paramount authority, and are most of them earlier in point of time; and the second class comprises writers of comparatively recent date. But there cannot be any question that the writers of both the classes flourished in this Kali age. And the omission on the part of the writers of the first class, to notice and give effect to the rules prohibiting practices recognized by the Smritis, leads to the conclusion which is perfectly legitimate, that the rules themselves were later innovations and had not come into existence when those writers flourished. Most of the recent writers of the second class, do not appear to have been practical lawyers, and they may very properly be called "Sanskritists without law." The divergence of opinion again, amongst them as to the number of sons that are to be recognized in this age supports the same view, and justifies the conclusion that they are writers of speculative treatises without any reference to the usages existing in society. They all rely upon the same authorities recognizing the Dattaka alone as the only secondary son in the Kali age, but some construe them strictly while others put on them a wider interpretation. In addition to the Dattaka, the Kritrima is recognized by the Dattaka-Mímánsá; the appointed daughter, by Bálambhatta and Kamalákara; and three other adopted sons, by the latter. Upon this state of conflicting views entertained by the different commentators, it becomes extremely difficult to understand what the law on the subject, is. And regard being had to the fact that the innovations introduced by the comparatively recent authors are not only opposed to what are admittedly the

[1] Dáyábhaga, XI, VI, 16.

infallible sources of law, but also to the earlier commentaries including those that are accepted as of the highest authority in other matters, a correct conclusion can be arrived at after weighing the nature and character of the authorities upon which the recent theory is founded.

**Character of Saunaka's work.**—Saunaka's work and the minor Puránas are the only authorities that form the foundation of the recent doctrine. The former work is relied on by Aparárka and Nanda Pandita, while other writers appear to invoke the authority of the latter. It is doubtful whether the treatise attributed to Saunaka should be ranked as Smriti. It deals with the ritual of the ten initiatory ceremonies and of other ceremonies performed by a householder; and like a *commentary* cites texts of well known Smritis and even of Puránas. This latter circumstance proves it to be a recent production. It does not deal with jurisprudence at all; but while describing the ritual of Játa-Karma or the ceremony on the birth of a child, it adds a few couplets on the ceremonial of affiliation of a son, that form the source from which Nanda Pandita endeavours to deduce the restrictions relating to the choice of the boy to be adopted. As for the passages concerning practices to be avoided in the Kali age, they are not found in some copies of the work.[1]

**Authority of Minor Puránas.**—As to the Upa-puránas such as the Vrihan-Náradíya and the Áditya Purána, I have already pointed out to you the difficulty in the way of accepting them as authority, when some of the Puránas themselves enumerate only eighteen works of that description, the authorship of which is attributed to Vyása. The Panditas, however, meet the difficulty by asserting that these minor Puránas are to be understood as supplemental to one or other of the principal Puránas. There is, however, another difficulty: the Puránas including the minor ones are affirmed by the later commentators to prescribe the duties to be observed in the Kali age; but even some of these works describe the twelve descriptions of sons, without a word that any one of them has ceased to be recognized in the Kali age. For instance, the Bráhma-purána,[2] the Káliká-purána,[3] and the Bámana-purána,[4] enumerate the twelve descriptions of sons and their relative rights of inheritance.

**Can these override Smritis?**—These, however, are the only authorities that form the foundation upon which is rested the doctrine that certain practices recognized lawful by the Institutes are to be shunned in the Kali age. Whether these are sufficient to outweigh and override the Smritis is a question which the later Bráhmanical writers who introduced the doctrine for the benefit

[1] See Sanskrit College manuscript copy.

[2] Colebrooke's Digest, Bk. V, ch. IV, verse 217, Madras Edition, vol. II, p. 344.

[3] *Ibid.*, Sect. I, verse 192; p. 333.

[4] Referred to in Dr. Wilson's works, vol. V, p. 47.

of their own class cannot be expected to raise and decide. They were on the contrary accepted without question by all the subsequent writers without exception.

**Reasons for the negative.**—The prohibitions for the Kali age, are as we have already seen, represented to have been laid down by those learned in sacred literature as cases arose in the beginning of the present age. We are not informed as to who these personages were. They must therefore be taken to have composed the *Parishad* or assembly of Bráhmanas learned in law, who might decide disputed points of law,[1] or lay down rules on matters in which the Sruti and the Smriti are silent. But there is no authority for the proposition that any rule clearly and unmistakeably propounded by the Sástras may be abrogated in the way in which those persons are said to have done. So far as the religious ordinances contained in the Sástras are concerned, they cannot possibly be altered, since the principle underlying them is entirely spiritual and beyond the scope of human reason. As regards the secular rules, they may be modified or repealed only by admitting the distinction between the sacred and profane matters, drawn by the Mitákshará and other commentaries, and adopting some general secular principle of utility or repugnance to popular feelings, such as is pointed out in these treatises. But to declare a number of duties required or practices recognized by the sacred law, to be unfit for the present age on religious grounds appears to be opposed to the theory of the origin of law, and based upon no principle. The story again that certain practices were prohibited in the beginning of the Kali age of which nearly five thousand years have now passed away, does not seem to be worthy of credit when the new rules were unknown to the authors of the Mitákshará and the Dáyabhagá, and it is impossible to believe that so important a matter should have escaped their attention. The truth appears to be that these are later innovations sought to be disguised by the fiction of an ancient origin. It must, however, be owned, that several of these innovations are useful improvements, they in fact declare that to be illegal which though recognized were disapproved by the sages on moral ground; but it is to regretted that all of them are not of the same character.

**Origin of the doctrine of prohibitions for Kali age.**—The doctrine that certain usages though perfectly lawful should be shunned in the present age, appears to have originated in the Deccan which became the stronghold of P-áhmanism since the rise of Buddhism, and more specially after the conq est of northern India by the Mahomedans had commenced. There cannot be a r doubt that some, at least, of the usages recognized, and laws propounded b Manu and other ancient sages became, in the course of time, obsolete, u uitable or repugnant to popular feelings, notwithstanding the stationary

[1] Baudhayana, I, I, I, 1-9; Sacred Books of the East, vol. XIV, 143 and 144.

condition of Hindu society. But the theory of the divine origin of the laws compiled in the Smritis presented, as I have already told you, an almost insurmountable difficulty in the way of changing them. The Mitákshará, however, has laid down a very sound and rational principle, upon the authority of a text attributed by the Víramitrodaya to Yájnavalkya, namely, that abhorrence of the people is a just cause for not enforcing a rule of the ancient law. But this principle could not, and therefore did not commend itself to the later Bráhmanical writers as it was calculated to be detrimental to their vital interests. The Bráhmanical supremacy itself was based upon the authority of the Smritis; and if repugnance to popular feelings were accepted as affording a ground for abrogating laws of the Institutes, the foundation of the superiority of their caste would be most unsafe. The rise and progress of Buddhism which declared the equality of men and which had converted most of the other classes of Hindus, taught a bitter lesson to the sacerdotal class, with respect to popular feelings towards their pretension to inherent supremacy. The dangerous principle enunciated by the Mitákshará, therefore, is ignored and passed over in silence by most of the later writers, while some of them notice the text upon which the principle is based, but explains it in a different way so as to make it conformable to the above doctrine, which they felt it necessary to introduce for the welfare of their class. The conclusion, however, which the Mitákshará bases upon that principle, is accepted by all, but it suggested to them the necessity of formulating a different principle consistent with their own interests which also required that certain other rules propounded by the Shasters should be abolished. I have already told you that the Smritis introduced the caste system, divided the members of Hindu society into four classes according to their qualifications and callings, and assigned the highest rank to the Bráhmanas, who were devoted to the pursuit of knowledge and religion. The Bráhmanical superiority, according to the Institutes, is not to be supposed a birth-right, but is one due to intellectual moral, and religious excellence. The most stringent rules are prescribed for the observance by Bráhmanas throughout their life, in order to entitle them to that superior position. Life was divided into four periods: and a Bráhmana is required to pass the first period as a student of the Vedas; the second, as a householder or married man; in the third, he is to cut off his connection with his family and retire to a forest for religious pursuit; and in the fourth he is to become an ascetic: and any one failing to observe the special duties required of a Bráhmana is declared liable to be reduced to the lowest position. Thus Manu declares:—"A twice-born man, who not having studied the Veda, applies dilligent attention to a different pursuit, soon falls, even when living, to the condition of a Súdra; and his descendants after him."[1] In the progress of time, however, the Bráhmanas

[1] Manu, II, 168.

became divisible into Bráhmanas by birth and Bráhmanas by qualifications. It was not possible for all the descendants of the original Bráhmanas to be equal to the intellectual, moral and religious duties, required of them. The study of the Vedas, to which a Bráhmana was enjoined to devote at least twelve years of his life,[8] was neglected by many either on account of their intellectual incapacity, or by reason of the barrenness of the pursuit; their attention was diverted to matters of secular importance, and they followed the professions prescribed for the lower classes. Under these altered circumstances, the voluntary retirement from the world in the third and fourth stages of life could not be expected from these secular Bráhmanas. Regard being had to the life led by them, they were scarcely distinguishable from members of the lower tribes. The usage of intermarriage again between a man of the Bráhmanical class with a woman belonging to a lower tribe, tended to produce a confusion of the castes, the distinction between which had become merely artificial; and it followed as a natural effect of that practice that the Bráhmanas used to partake of food cooked by Sudras, for though much disapproved the espousal by a Bráhmana of a Sudra damsel was not illegal. The sacerdotal class appears to have reviewed their position, and perceiving that these practices were opposed to their claim of superiority and calculated to bring them down to a level with the lower classes, set themselves to find out a remedy, and the doctrine we are considering was the result. A consideration of the practices that are to be shunned according to it, will show that the list is made up, of those usages that are to be eschewed according to the Mitákshará as being repugnant to popular feelings, of those rules that are detrimental to Bráhmanical interests, and of some other practices. It gets rid of the dangerous doctrine propounded by the Mitákshará, relieves the Bráhmanical class of the liability of losing their superior position for non-observance of the rules of Smritis that form its foundation, and creates a wide gulf between the Bráhmanas and the Súdras, the two principal tribes, the other two intermediate classes having been almost swept away by the rise of Buddhism, when they had renounced their position as twice-born, and on the re-establishment of Bráhmanism, became reduced to the condition of Sudras. Study of the Vedas for a long time, retirement from the world in old age, intermarriage, partaking of food prepared by Sudras, and sea-voyage are amongst the practices prohibited. The reason for forbidding the last, may be, that as the countries beyond the seas on both sides of the Indian Peninsula were inhabited by Mahomedans Buddhists who have no caste system, an intercourse of the Hindus with them was likely to injure the Bráhmanical interests.

**Their character.**—As to the character of these prohibitions for the Kali age, which are represented to have been one after another laid

[8] Apastamba, 1, 1, 2, 16; Sacred Books of the East, Vol. II, p. 7: Manu, III, 1.

down by wise men as cases arose at the commencement of the present age, and which are embodied in some of the Puránas and Upa-Puránas, it should be observed that some of these forbidden practices are observed by orthodox Hindus even to the present day, and their conduct is not thought exceptionable on that ground. And although the Upanayana ceremony has become a farce, yet there are Bráhmana youths prosecuting the study of the Vedas for a long time, who are not considered on that account to be guilty of any misconduct. The rule though forbidding the practice itself, was no doubt, intended to declare that the duty of studying the Vedas for years, laid down in the Smritis is no longer obligatory. There are also pious men, who in their old age retire from the world and resort to some holy place to devote the rest of their lives to religious matters. Pilgrimage, again to distant holy places, instead of being eschewed, has increased to an unprecedented extent, thanks to the security and convenience of travel by railway. These are sufficient to show what respect is paid to the above prohibitions which appear to be regarded as merely recommendatory in character.

**Prohibition as to sonship.**—Let us now proceed to consider whether the restriction relating to sonship, which declares that the *aurasa* and the *dattaka* are the only descriptions of sons lawful in the Kali age, stands on a different footing or is a rule of the kind mentioned above. We have already seen that some writers construe the above restriction so as to include other descriptions of secondary sons. Let us now see what the latest of the Bráhmanical writers says on this subject. Jagannátha Tarkapanchánana a Bengal Pundit celebrated for his vast learning and erudition[1] compiled at the suggestion and under the superintendence of Sir William Jones a work on Hindu law denominated the Viváda-Bhangárnava, the English version of which by Colebrooke goes by the name of Colebrooke's Digest. After having elaborately dealt with the twelve descriptions of sons, he concludes by remarking thus: "Among the twelve descriptions of sons begotten in lawful wedlock and the rest, any others but the son of the body and the son given are forbidden in the Kali age. Thus the Aditya-Purána, premising 'The recognition of any but a son lawfully begotten or given in adoption by his parents,' proceeds: 'These parts of ancient law were abrogated by wise legislators, as the cases arose at the beginning of the Kali age with an intent of securing mankind from evil.'"[2] Thus he adopts the view of the previous writers already noticed. But what he says in the next paragraph is most important in the present connection and deserves a careful consideration:—"Among these twelve descriptions f sons, we must *only* now admit the rules concerning a son given in adopti a and one legally begotten. The law concerning the rest has been inserted, o

[1] Keri Kalitani, *v.* Maniram Kalita, 19, W. R., 367.

[2] Colebrooke's Digest, V, IV, XV, 300; Madras Edition, Vol, II, p., 416.

complete that part of the Book; as well as for the use of those who, not having seen such prohibitory texts, admit the filiation of other sons. Thus, in the country of Odra (Orissa,) it is still the practice with some people to raise up issue on the wife of a brother." This passage affords complete evidence that although Jagannátha like other Bráhmanical writers gave prominence to the theoretical prohibitions for the Kali age, contained in the Áditya-Purána, yet he felt himself bound to admit that in spite of those prohibitions, the ancient usages relating to sonship did practically obtain in Hindu society.

**Conclusion.**—Considering the practical importance of the subject of the prohibitions for the Kali age, I have dealt with it at some length, and the conclusion which appears to follow from a review of the works of the later Sanskrit writers is, that although these prohibitions including the one relating to sonship, met with the approbation of all learned Bráhmanas who agreed in putting them forward as authoritative, and were backed by their sacerdotal influence which was very great on Hindu society, yet these rules were not all followed in practice by the entire Hindu community. In one respect, however, namely, intermarriage of the different tribes, the actual practice has gone further than the restrictions for the age of discord prohibit, and even the Bráhmanical class has been split up into numerous subdivisions between which there is no connubium. As regards the restriction in respect of sonship, which again is not strictly construed by some of the Bráhmanical writers themselves, the utmost that can be said is that so far as the Bráhmanas generally, and other classes who were closely associated with them and followed their noble example, were concerned, it seems to represent the actual practice; but amongst the general body of the community not excluding some of the secular Bráhmanas or those that are so by mere descent, and are hardly distinguishable from the lower classes, the ancient usages do not appear to have entirely died out. Even the worst descriptions of sons such as the Kshetraja or Gúddhaja seem to have until recently been practically recognized by one sect of the latter class of Bengal Bráhmanas, who, trampling under foot the dictates of the Shasters, had adopted an abominable custom according to which a man of a particular description could be an extensive polygamist though at the same time too poor to provide with maintenance and habitation his numerous wives sometimes exceeding even a hundred in number, who remained in their father's house and re seldom if ever approached by their so-called husband. The records of cal usages, compiled under the authority of the British Government, prove e continuance of the ancient practice of re-marriage of widows, amongst ny lower castes of Hindus,[1] which show that the Paunarbhava son is still

[1] See Mandlik's Hindu Law, Appendix, p., 441, *et seq.*

recognized in many districts. It is, however, worthy of remark, that although the Hindus generally adhered to their ancient customs and usages yet the religious principle and other causes combined to raise the moral tone tending to create an aborrence of the immoral practices to which the secondary sons by operation of law owed their existence; and the few changes in the customs and usages, that we find are not attributable solely to the precepts contained in the works of later writers.

LECTURE IV.

# BRITISH PERIOD, LAW OF ADOPTION, FACTUM VALET, AND CASTE RULES.

**Motives for adoption and falling off of the practice—Hindu law during the Mahomedan rule—Commentaries composed during Mahomedan rule—British administration and Hindu law—The Pundits—Neglect of enquiry into usage—Undeserved weight attached to Dattaka-Mímánsá—Dattaka-Chandriká, its author and authority—Dattaka-Chandriká is a literary forgery—These works not specially respected by Pundits—Dattaka-Tilaka and other works—Sutherland's translation and opinions—Customs and the special treatises—Case-law—*Stare decisis*—Dattaka and Kritrima only recognized—Appointed daughter's son and *Illatam* son-in-law—Privy Council on Putriká-putra—Son of pregnant bride recognized by Privy Council—Paunarbhava recognized by the Legislature—Dattaka and Kríta sons—Kritrima and Svayandatta—Apaviddha and Pálakputra—Dattaka and Kritrima, subjects of law of adoption—Dattaka, Poshya and Pálaka Putra—To whom law of adoption applies?—Whether it applies to the Bráhmas and like—To Hinduised Koches—Custom barring adoption—Theory of sonship and adoption—Spiritual and temporal objects of adoption—Predominance of secular object—Adoption of daughters—Adoption of Pautra and Pra-pautra—Adoption according to Nanda Pandita spiritually obligatory—*Factum valet*—Principle of it according to the Dáyabhága—Doctrine recognized by the Mitákshará, origin of the notion that it is not—The word *kartavya* in a rule indicates it to be directory—Statement in a precept, of the reason of the rule indicates it to be so—Applicability of *factum valet* to adoptions—Caste rules—Origin of castes—Privileges of twice-born tribes and disabilities of Súdras—Bráhmanical pretensions resented by Kshatriyas—Rise of Buddhism—Fusion of Bráhmanism and Buddhism in the Tántrika system of modern Hinduism—Modern Súdras; is their marriage licensed concubinage—Intermarriage and inter-adoptions between different tribes—The same between different subdivisions of the same tribe—What is prohibited to twice-born tribes, but permitted to Súdras, is recommendatory—Topics of law of adoption.**

**Motives for adoption and falling off of the practice.**—In the preceding lectures I have endeavoured to trace the history of the law of adoption from the earliest times down to the commencement of the British rule. I have shown to you that originally the motive for recognition of the various kinds of sons was entirely a secular one, and quite unconnected with religion: the exigencies of the unsettled state of society, and of the patriarchal form of government raised the importance of sons in the earliest times when they were regarded as arrows in the hand of a mighty man," and "happy was the man who had his quiver full of them."[1] This requirement of ancient society, as well as the

[1] Psalm cxxvii.

however, to the institution of village community and the caste system as well as to the ancient usages of the country and to the law-abiding character of the people, it seems that so far as the civil matters to which the Hindu law was applicable, were concerned, the general body of the people would seldom if ever appear before the king's court for justice : all disputes of the kind used to be ordinarily settled by the village Punchayet or the caste Punchayet, who were the repositories of the few customary rules sufficient for a simple society like that of the Hindus. It is only in those cases in which greater interests were at stake, that parties would require the interference of the king's officers who, if conscientiously disposed, must consult learned Bráhmanas to advise them on disputed points of law or usage. I have already told you that the Bráhmanas are by the dictates of their shasters forbidden to associate with Mlechchhas, and so it is not likely that they would lower themselves in the estimation of the Hindu community by consenting to mix in the society of the Mahomedans at least at the commencement of their rule. Later on, however, when the Mahomedan rule appeared to be permanently established, the less orthodox amongst the Bráhmanas, would gradually be induced by secular motives to seek the patronage of the rulers of the country. The Bráhmanas that were consulted by the Mahomedan rulers and officers for information on points of Hindu law and usage, were called *Dvára* (door) Pundits, by reason perhaps of their attending the houses of their Mahomedan patrons, which was a new departure. The revenue officers, who were the predecessors of the modern Zemindars and Talukdars, appear to have possessed all the functions of government including the administration of justice amongst Hindus, and in many instances they were like tributary chiefs under the Mahomedan sovereigns. Where these officers were Hindus whose services were availed of and greatly valued by the Mahomedan rulers, there would be no difficulty in securing the co-operation of the most orthodox Bráhmana in the adminstration of justice.

**Commentaries composed during Mahomedan rule.**—But, however, that may be, it is beyond all question that under the Mahomedan rule, the Bráhmanas lost their original privileges, and from being the expounders of law and administrators of justice as they had been in Hindu times, became reduced to the secondary and minor position of irresponsible advisers and experts on a few branches only of Hindu law. They were thus deprived of the practical training possessed by judges and lawyers, and lost the incentive to the attainment of superior proficiency in the study of jurisprudence, which under the altered state of things must have necessarily been neglected. It is, also a significant fact that of the works on Hindu law written during the Mahomedan period, none appears to have been composed under the patronage of any Mahomedan ruler. On the contrary the authors were celebrated teachers of

religion and law, and therefore not likely to violate the religious ordinance prohibiting intercourse with the Mlechchhas. Hence their works, in so far as they differ from the earlier commentaries and introduce new rules that had not been known before, cannot bear even a remote resemblance to legislative enactments as they were not composed under the auspices of the ruling authority. Nor can the innovations found in them be accepted as reliable evidence of changes in the ancient usages of the country, because the writers who were not practical lawyers cannot be supposed to have sufficient opportunity of accurately observing the actual practices of the various classes of people residing in the vast continent of India, and because they do not profess to rest their peculiar views on such a sound basis. With respect to one writer of this class, a distinguished judge of the High Court is reported to have made the following observation:—"As to Juggernath Tarkapaunchaun, admitting fully his vast and noted erudition, I do not think he would be a safe guide for the courts, on the strength of his own opinion, upon such a matter. He seems indeed to be, like many of the writers on Hindu law, a merely learned person, neither a judge nor a lawyer, but Pundit and logician, and without their merit of being accurate and precise."[1] And this observation applies with equal force to all the writers on Hindu law, that flourished in the Mahomedan India. The only rational ground upon which their opinions unsupported by clear authority may now be treated as binding rules of Hindu law, must be that they have subsequently been adopted by the general body of the Hindu community as positive rules of conduct. If this ground cannot reasonably be substantiated it would be wrong to inflict them on Hindus as legal rules by which they must guide themselves.

**The British Administration and Hindu law.**—The British rule has opened a new era for India in all matters affecting the condition of its people. Since the Company's accession to the Dewany the administration of revenue and with it the administration of civil justice came under the control of the English people. They at first allowed the previous state of things to continue, according to which the collectors of revenue, appointed by them performed also the functions of judges of civil courts. Later on the two offices were separated, and in each of the districts into which the territories under British dominion were divided, a civil court was established presided by a European judge. To each of these district courts and other civil courts of superior grade was attached a Pundit called its Hindu law officer who was to advise the judge on points of Hindu law in matters of succession, inheritance, marriage, religious institutions and caste.[2] But a people characterized by conscientious

[1] Kerry Kolitanee, *v.* Moneeram Kolita, 19, W. R., 367.

[2] Reg. IV of 1793, Section 15.

scruples, and sense of duty, as well as indomitable energy and industry before which no difficulty seems insurmountable, could not long remain satisfied with the second hand information alone about a system of law they had taken the responsibility upon themselves to administer. Nothing short of legal knowledge from the fountain sources would satisfy them; and Sir William Jones, who in his letter addressed to the Supreme Council for a new digest of Hindu law declared "that I could not, with an easy conscience, concur in a decision on the written opinion of native lawyers," was the first judge that mastered the difficult language in which "the Hindu laws are locked up," and published an English translation of the Code of Manu. His premature death threw the task of translating the digest compiled by Jagannátha under his auspices, on Colebrooke whose profound knowledge in an eminent degree, of the Sanskrit literature in all its branches, is abundantly testified by his writings on different subjects. His translation of the digest was published in 1796. He collected all the available works on law, and being satisfied upon enquiry that the Mitákshará and the Dáyabhága are commentaries, of paramount authority, published a translation of them in 1810. In the preface to this work, he notices Vaijayantí the commentary on Vishnu-Smriti, and then observes "Nanda Pandita is author also of an excellent treatise on adoption, entitled Dattaka-Mímánsá." This remark perhaps induced Mr. Sutherland to translate the Dattaka-Mímánsá, and he published in 1819, his English version of that work and of another treatise entitled Dattaka-chandriká. These translations together with dicisions passed by the British courts formed the materials from which systematic treatises on Hindu law were compiled and published by Sir F. Macnaghten in 1824, by Sir Thomas Strange in 1825, and by Sir W. Macnaghten in 1829, who though not Sanskritists themselves, possessed the experience of judges and had the advantage of consulting the Pundits attached to the different courts. These persons are respected as the highest European authorities on Hindu law.

**The Pundits**—appointed to advise the judges had no practical training of a lawyer; they were merely Sanskrit scholars who had studied some works on law under the tuition of a learned teacher of the works on law. They had no precedents to guide them in answering any question put to them. There is not a single commentary on Hindu law, which deals with any subject in an exhaustive manner; even the details of the order of succession have not been given, so that there are even now doubtful points with respect to distant succession, that are yet to be settled by our courts of justice. The commentaries again, that are respected in particular localities are not at one on several points of detail. They moreover contain rules some of which are now settled to be of moral obligation only, and not of legal obligation. Under such circumstances, it is impossible to expect uniformity of opinion on all points referred to the Pundits; and it

would be absurd and unjust to impeach their honesty on account of the divergence of their opinions, and to pass an indiscriminate censure on them. The position again that was assigned to them was an inferior one of irresponsible advisers, and if they were like experts biased in favour of any party to a suit, there were similar reasons for it. Considering that the Pundits were the repositories of law, at least one of them should have been raised to the rank and emoluments of a judge of the Sudder Dewany Adawlut or the Supreme Court, so that he might have been above all suspicion. There is no doubt, however, that the Pundits were placed in a very tempting situation, and it is natural that the less scrupulous amongst them could not be proof against improper influences. Tradition tells us of an instance of a serious deception practised on English judges whereby a literary forgery has come to be regarded as an authority on the law of adoption, to which I shall presently refer. A distinction is sometimes attempted to be drawn between Pundits that professed to be lawyers and those that were not so, when it becomes necessary to get rid of an opinion of Jagannátha's, whose authority is sought to be disparaged by characterising him as a mere logician and not a lawyer. The distinction is rather an imaginary than a real one, because Naiyáyika or Smárta, a Pundit was merely a Sanskritist and not a lawyer. What the regular course of study was for a Smárta may be gathered from Raghunandana's work entitled Smriti-Tattva designed for students of law, containing twenty-eight books, of which twenty-five are devoted to the discussion of religious ceremonies and ritual, one deals with marriage and its ritual, another with constitution of courts, and a third is an epitome of the Dáyabhága. A Smárta Pundit was ordinarily concerned more with religious rites than with law. But no learned Bráhmana could aspire to the rank of a professor or teacher, be he a Naiyáyika, without studying the commentaries on law, respected in the province. The brightest intellects alone became celebrated as Naiyáyikas, while men of inferior capacity whose aspirations could not rise so high were contented with becoming merely Smártas.

**Neglect of enquiry into usage.**—Although the judges of the superior courts hesitated to repose full confidence in the opinions of Pundits on questions of law, arising in pending cases, and referred to them, yet in all other matters implicit reliance was placed on them by Sir William Jones, Colebrooke, and the other European gentlemen through whose labours Hindu law has been, as it were, brought to light; and the views of Hindu law, taken by those Hindu lawyers, have been tinged with the errors and omissions of Pundits who had long since ceased to be practical lawyers, and had therefore no clear conception of any distinction between law and religion, and between what they thought ought to be and what actually was the state of society. Under the guidance of Pundits the English gentlemen who devoted their attention to Hindu law, were led into the belief that the people were actually governed in

all matters by the rules of conduct laid down in the Sanskrit works, and that the innovations introduced by the latest writers had the effect of overruling different rules found in the earlier commentaries. Accordingly with a view to ascertain the law of the people, they spared no pains to collect all the Sanskrit works on law, of which they had received any information. It did not, however, occur to them that the law enunciated in those works might be at variance with the actual usages of the people, and no enquiry was instituted to find them out. But there was sufficient ground for putting them on enquiry, and the abstension from it shows that they had no reason to distrust the correctness of the information supplied by the Pundits. And regard being had to the difficulty of the task it is unreasonable to expect them to master the subject so as to become independent of the Pundits. The text-writers, whose works have come to be regarded as high authority on Hindu law, had, no doubt, sufficient materials placed before them by Colebrooke and Sutherland in the English language, a perusal of which cannot fail to show that so far as the law of adoption is concerned, there is considerable divergence between the two leading treatises, and the later works regarding the number of secondary sons; as well as between the special treatises on adoption and all the other commentaries, the former propounding restrictions that are not found in the latter. Sir F. Macnaghten in his Considerations on Hindu law, notices the conflict with respect to the number of subsidiary sons, but accepts without hesitation Jagannátha's explanation based upon the passage of Áditya-Purána. The learned author's attention, however, was not arrested by the very next paragraph of Jagannátha's digest in which the continuance of ancient usages relating to sonship is admitted. The fact seems to be that in compiling their works on law, these text-writers were to a great extent guided by the Pundits consulted by them, whose ignorance if not self-interest, misdirected them so as to prevent any enquiry into actual usages, which when properly made has brought to light the important fact that the innovations, met with in the special treatises on adoption are not followed in practice by the people.

**Undeserved weight attached to Dattaka-Mímánsá.**—The treatises exclusively dealing with the law of adoption were very naturally regarded to be of greater authority in questions relating to that branch of the law, and the adventitious circumstance of the Dattaka-Mimánsá and the Dattaka-Chandiká, being translated into English, invested them with special importance so that they have come to be accepted as paramount authority on the particular subject of adoption. Of these treatises the Dattaka-Mimánsá of Nanda Pandita appears to be the earliest, but it was, as I have already told you, composed in the middle of the seventeenth century; and the other treatises follow the method of that work, and propound generally the selfsame rules with modifications in some important particulars. Upon an examination of these works you will

find that a body of rules has been evolved by their author from a few texts which they profess to interpret; and from the manner of their argument they appear to be biased advocates of foregone conclusions. So far, however, as the rules that are fairly deducible from texts of admitted ancient sources of law are concerned, they are properly receivable as authoritative, and it would not be a valid reason for discarding them upon the ground that such texts are not noticed by other commentators of admitted authority. But as regards those rules and restrictions that are not only not supported by the natural and fair construction of the texts from which they are sought to be deduced, but are inconsistent with the ancient law and usages of the country, and appear to be evolved out of the inner consciousness of Nanda Pandit, it would be unjust to treat them as binding on the people, unless they serve some useful purpose, or there be some sound principle of equity and justice for enforcing them. Should, however, the rules appear to be unreasonable and contrary to natural justice and to uselessly fetter the freedom of action and choice of men in matters that should properly be left to their discretion, so that our courts of justice would never have enforced them had it not been for the belief that they were bound to do so, then it is clear that the judges laboured under a serious misapprehension. Nanda Pandita did not enjoy the position of a legislator, so that his innovations would have the force of law simply because he propounded them. The only ground upon which his work could be maintained as paramount authority, is that the people had adopted of their own accord, his views as binding rules of conduct. But considering that he flourished only a little over a century before the establishment of British Government, it is impossible to believe that his rules locked up in a dead language had by that time been promulgated throughout the length and breadth of the vast Continent of India, when there was no printing press, no railway communication, nor postal arrangement. On the contrary, we have ample evidence that the book itself was unknown except to a few Pundits of Benares. It was certainly unknown to Jagannátha who, in his elaborate disquisition on sonship and affiliation, does nowhere refer to it, nor notice its peculiar rules; and it is more probable than not that it was unknown in Bombay and Madras.[1] Again if the actual usages relating to adoption, amongst the people in any part of India be even now enquired into, they would be found to be at variance with many of its rules,—a fact conclusively proved by the result of the enquiry instituted by Government officers for recording the customs of the Punjab, which became a British province in the middle of this century. That it was purely a speculative treatise is evidenced by the fact that its rule propounding the absolute incapacity of widows to adopt is not respected in any place; as well as by

[1] Mandlik's Hindu Law, Introduction, p. lxxii.

the fact that most of its rules are not found in the Vaijayánti, an earlier work of the same author. And its chapter on adoption of daughters affords the most conclusive proof that the author was a mere theorist, the idea did not occur to any other Sanskrit commentator. Thus, it is difficult to find out any cogent reason for assigning to the work, the rank it has been permitted to acquire. Colebrooke engaged in collecting works on law, came across this treatise, most probably procured for him from Benares, and finding it, on perusal, to be written in good and learned style, remarked that it is an excellent treatise on adoption. This certificate, and the English dress, enabled it to form the acquaintance of the English judges, and to acquire a respectability and reputation which it did not possess amongst the Hindus, even of Benares in which province it is deemed to be the infallible guide. The ignorance of the history of its author invested it with a halo of antiquity; but if the age of the work were known, and which could easily have been found, had sufficient enquiry been made, our judges would undoubtedly hesitate to give effect to several of its innovations.

**Dattaka-Chandriká, its author and authority.**—The Dattaka-Chandriká purports to have been composed by Kuvera; the concluding passage of the work says,—"Thus is completed the Dattaka-Chandriká compiled by the Mahámahopádhyáya and fortunate Kuvera." The learned translator, however, substitutes the name of Devanda-Bhatta in the place of Kuvera,[1] and in the note appended, assigns the following reason for this alteration:—"The printed copy, as well as manuscripts, read Kuvera. As, however, the author avows himself, to be the writer of *the* Smriti-Chandriká, which is known as the production of Devanda-Bhatta, this name in the translation has been substituted." The supposed avowal is inferred from the two slokas with which the book opens, and which have been translated thus: "By the favour of Chandikála, the Dattaka-Chandriká, the dispeller of the doubt, arising from what was not propounded in the *Chandriká*, is compiled. Every rule relative to the adopted son, ordained for the Kali age, which was not discussed by me in the Smriti-Chandriká, in treating on the eighteen topics of litigation, propounded in the texts of Manu, and other saints, is fully and specially expounded here." There is nothing in this passage, which can justify the conclusion that the author of the Dattaka-Chandrika was the author of the commentary of Devanda-Bhatta entitled Smriti-Chandriká, assuming the translation to be a correct one. Mr. Sutherland laboured under the misapprehension, that wherever the word Smriti-Chandrika is used, it must be taken to intend Devanda-Bhatta's wo bearing that name. The word Smriti-Chandriká, means literally 'moonlig of law,' and this name may be given by any author to his work on any branc

[1] Sutherland's Translation, Section VI, Peroration.

of law; hence reading together the opening slokas and the last passage of the book, the meaning that naturally suggests itself is that Kuvera had written a commentary which was also entitled Smriti-Chandriká. Just as Dattaka-Mímánsá which means 'disquisition on adoption' is the name not only of Nanda Pandita's work, but also of several other treatises on the same subject, the authors of which were, Vidyáranya Svami, Sríráma Pandita,[1] and Somanátha, who flourished in Deccan.[2] The two opening slokas, however, admit of a different construction and may be rendered thus:—"By the favour of (Siva) the god of destruction having the moon (in his forehead,) is compiled the Dattaka-Chandriká or moonlight of adoption, the dispeller of the darkness of doubt arising from a want of lucid exposition. The entire law of adoption, ordained for the Kali age, which is not discussed even in the eighteen topics of litigation propounded by Manu and other saints is specially considered at length and explained by me in this Smriti-Chandriká or moonlight of the law, (of adoption.")[3] If this translation be the correct version, then even the slender basis upon which the learned translator founds his hasty conclusion, fails altogether. The styles again of the Dattaka-Chandriká and the Smriti-Chandriká are so different that they cannot be held to have been written by the same author.

The misconception under which the translator laboured, led him to make the following observations in his preface:—

"The Dattaka-Chandriká is a more concise treatise, on the same subject, by Devanda-Bhatta, the author of an eminent compilation of law entitled the Smriti-Chandriká. It is a work of authority, and supposed to have been the ground-work of Nanda Pandita's disquisition. The doctrines of the two books, vary on some points, and as the work is short, it was deemed advisable to include it in the present publication.

"Having said thus much, in explanation of the selection made, the translator would willingly annex some account of the authors, whose tracts are now presented in an English dress. With very limited opportunity, however, he has failed in ascertaining any particulars, relative to them further than that they are both writers of Southern India. Of the Smriti-Chandriká of Devanda-Bhatta Mr. Colebrooke observes,—'This excellent treatise of judicature, is of

[1] Collector of Madura *v.* Mootoo Ramalinga Sathapathy, 12 Moore's I. A. p. 397.

[2] Mandlik's Hindu Law, Introduction, p. lxxii.

[3] The original slokas are as follows:—

चन्द्रिकानुन्न-सञ्जात-संशय-ध्वान्त-चन्द्रिका। चन्द्रिकाख्यानुभावेन कृता दत्तक-चन्द्रिका॥
मन्वादि-वाक्य-विहतेषु विवादमार्गेष्वहं दर्शयिष मया स्मृति-चन्द्रिकायाम्।
कल्पस्य दत्तकविधिर्न विवेचितो यः सर्व्वैः स चात्र विततो विहतो विशेषात्॥

For the sake of the metre the author was obliged to use, in the latter text, the word Smriti-chandriká instead of Dattaka-Chandriká or Datta-Chandriká.

great and almost of paramount authority, as I am informed, in the countries occupied by the Hindu nations of Dravira, Tailanga and Carnáta; inhabiting the greatest part of the peninsula or Dekhin.' It is not unlikely, that the Dattaka-Chandriká may have attained equal distinction."

These erroneous and fanciful surmises were taken to be correct and the translation was consulted by the judges as authoritative on questions of adoption; and ten years after its publication Sir W. Macnaghten in the preface to his Principles of Hindu law, observed: "In questions relative to the law of adoption, the Dattaka-Mímánsá and Dattaka-Chandriká are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares." And the Privy Council has invested this observation with authority by giving it a place in one of its judgments.[1]

You are now in a position to understand the adventitious circumstances and the erroneous process of reasoning, which contributed to the notion that these two treatises are respected all over India. But what is most inexplicable is the theory that the Dattaka-Chandriká is especially respected in Bengal and by the southern jurists. The hypothesis of the work being a composition of Devanda-Bhatta's may very well explain the reason for supposing it to be respected in those places where his Smriti-Chandriká is accepted as authority. But none of these European authorities on Hindu law assign any reason as to why the Dattaka-Chandriká should be respected in Bengal where the Smriti-Chandriká is not treated as any authority. It is, however, a very curious fact, and worthy of special remark, that the Dattaka-Chandriká, though regarded as a book of special authority in Bengal, was entirely unknown to Jagannátha, who does not notice it at all in his digest. The opinion that this treatise was the ground-work of Nanda-Pandita's disquisition appears to be a mere conjecture; for he does nowhere refer to it, nor is there anything else which might support the view. In one place only[2] a passage from the Chandriká is cited, but the work referred to, is the Smriti-Chandriká and not the Dattaka-Chandriká.

**Dattaka-Chandriká a literary forgery.**—There is, however, a well-grounded tradition that the Dattaka-Chandriká was a literary forgery[3] concocted for the purpose of supporting the case of a claimant by adoption in a suit pending before the Supreme Court of Calcutta, at the close of the last century. The real author of the book was Raghumani Vidyábhúshana of Bahirgachi a village in the District of Nuddea, who was a contemporary of Jagannátha and a private tutor or Pundit of Colebrooke and other European students of Sanskrit,

[1] Collector of Madura, *v.* Mootoo Rumalinga Sathapathi, 12 Moore's, I. A., 397.

[2] Dattaka-Mímánsá, VI, 8.

[3] Vidyáságar's Disquisition on Widow Marriage, p. 182.

who resided in Calcutta. It is said that he, in consultation with the then Pundit or Hindu law officer of the Supreme Court, compiled the work in three days. There are in the book only three slokas composed by the author himself; of which the two prefatory ones with which the book opens misled the learned Translator into the erroneous opinion with respect to its authorship; and the other embodying the peroration is said to be an acrostic indicating the real author's name and supporting the tradition. This last sloka runs as follows:

र—म्येषा चन्द्रिका दत्त—पद्धते र्दर्शिका ल—घु।
म—नोरमा सन्निवेशै—रङ्गिनां धर्मतार—णिः॥

in Roman character it is as follows:—

*RA—myaisha chandriká datta-paddhater—darshiká la—GHU*
*MA—noramá sannivesair—anginám dharma—tára—NI.*

By putting together the first and the last syllable of each line of this couplet, 'RAGHUMANI' the name of the real author is obtained.

The tradition furnishes us with an account of the circumstances connected with the fabrication of the book, and the internal evidence afforded by the book itself lends considerable support to it. These circumstances may shortly be stated thus:—There was a well-known titular Rájá who being destitute of male issue, had adopted a son, but subsequently a son was born to him. At the time of adoption he executed a document relating to the devolution of his estate in the event of his getting a son of the body, which was favourable to the adopted son. But after a son was born to him he executed another document which was partial to his real son, and derogatory to the rights conferred on the adopted son by the earlier instrument. After his death a dispute arose between the real and the adopted son regarding succession to his estate. Titular Rájáship was a new idea, and the estate of such a Rájá might naturally be looked upon as a ráj or kingdom which is impartible and descendible only to the son of the body. Hence, leaving aside the documents, the questions that could be raised in such a case were, whether the estate of the Rájá was liable to partition between the real and the adopted son; and if so, then in what proportion was it to be divided between them. According to the Dattaka-Chandriká manufactured at the instance of the adopted son, both the questions were to be decided in his favour. This treatise gives a larger share to an adopted son than what is recognized by all other commentators, when partition takes place between him and a real legitimate son; and goes further if the parties be Súdras, by contending that in such a case they ought to divide the property in equal shares. The last proposition was the most important, according to the tradition, for the Rájá was a Káyastha and therefore admittedly a Súdra.

On a careful consideration of all the circumstances, the correctness of the traditional account does not appear to be unlikely at all. Had the case pro-

ceeded to trial instead of being compromised as it was, the question as to the genuineness of the book would in all probability have been raised, if it was really a fabrication bearing the fictitious name of Kuvera as its author; so the only chance of the discovery of truth was lost, and the way became clear for the work to pass as a genuine production of some ancient writer.

**The Dattaka-Mímánsa and the Dattaka-Chandrika** do not seem to have been specially respected by the Pundits; this is a fact which may be inferred from an important evidence afforded by Sir F. Macnaghten's work. In the case of Gaurballabh, the question whether an adopted son is entitled to inherit from the grandfather by adoption, was referred to fifty-one Hindu law officers attached to the different courts in the Lower and the North-Western Provinces of Bengal; the English translations of their answers are given in the appendix of that work. On going through them, you will find that only three or four of the Pundits refer to the two special treatises as authorities while the rest rely upon the Mitákshará, Dáyabhagá, Vivádachintámani, Víramitrodaya and similar works, but not on the Dattaka-Mímánsá or the Dattaka-Chandriká, although the opinion of the majority, which was in the affirmative and favourable to the adopted son, could be based on the latter treatise. The conflicting opinions delivered by the Pundits attached to superior and inferior courts in some of the cases carried up in appeal to the Sudder Dewany Adalut show that they made use of the Sanskrit works for supporting their answers more like advocates than impartial jurisconsults. For instance in two cases[1] coming up from districts governed by the Benares school the question was whether a widow could adopt a son without any power from her deceased husband, and it was contended that she could, upon the authority of the Víramitrodaya which is declaratory of the law of the Benares school. In the opinion, however, that was accepted and ultimately acted upon, it was stated that the Víramitrodaya was overruled by the Dattaka-Mímansá, a work of superior authority. If this view were correct, no widow in the provinces governed by the Benares school would be competent to adopt even under an express authority of her deceased husband, since Nanda Pandita maintains that widows cannot adopt at all.

**The Dattaka-Tilaka and the Dattaka-Siddhánta-Manjarí** are two other treatises on the particular subject of adoption that came to light under suspicious circumstances when another adoption case[2] was pending for trial before the Supreme Court of Calcutta, in which the validity of simultaneous adoption of two sons was the point in question. Both these books maintain

[1] Raja Shumshere Mull *v.* Rani Dilraj, 2 Sel. Rep., p. 216, (new edition); and Jai Ram Dhami *v.* Musan Dhami, 5 Sel. Rep., 3, (new edition).

[2] Monemothonath Dey, *v.* Onanthnath Dey, 2 Indian Jurists, N. S., 24.

the legality of such adoptions, and were placed before the court as authorities on the subject.

**Dattaka-Nirnaya and other works on adoption.**—In addition to the works on adoption, already referred to, there are other works on the same subject, namely, the Dattaka-Nirnaya, the Dattaka-Dídhiti, the Dattaka-Darpana and the Dattaka-Kaumudi. Sir F. Macnaghten had in his possession an English version of the Dattaka-Nirnaya, the author of which was Srikara Áchárya. All these works may be usefully consulted, as throwing light on several points; for even if it be admitted that any one of them was written for the purpose of maintaining a particular doctrine, its views on other matters are not likely to be vitiated thereby. The six works referred to above, together with the two translated by Sutherland, have been published in the form of a digest, by Pandit Bharatchandra Siromani.

**Sutherland's translation and opinions.**—Leaving aside the few usages that have forced their way into courts and have been recognized by them in spite of contrary rules propounded by the Dattaka-Mímánsá and the Dattaka-Chandriká, it should be observed that justice in cases of adoption has been administered principally according to the English version of these treatises and the opinions of the Translator expressed in the synopsis appended to the translation; and mistakes in these have necessarily affected the decisions. It is difficult to preserve with accuracy the sense and spirit of the original in its translation into a quite different language. If the practice of adoption had been prevalent in Hindu society instead of being rare as it is, and there had been a large number of cases so that the law and usage should have been well known to Pundits and to the legal practitioners, the true sense of the passages which are vaguely, ambiguously or wrongly done, would have come to the notice of the judges. As regards accuracy Sutherland's translation appears to be far inferior to Colebrooke's English versions of the Sanskrit law books. A few of the lapses in the rendering is characterized by what was once, facetiously observed by a learned counsel while arguing a case, to be 'an author's unconscious partiality for the hero of his work.' A translator's duty ends in transferring the source of knowledge from one language to another, but it does not necessarily follow that he is as such the proper person to form a correct opinion on all questions that are to be answered in accordance with the book translated, especially when it is an argumentative work on law, full of speculations. I shall have occasion to point out to you that the views entertained by the learned Translator on a few important points, are not in accordance with the book itself.

**Customs *versus* the special treatises on adoption.**—That customs are a source of law, is recognized by jurists, although there is a difference of opinion as to the mode in which they acquire the force of law. In this country, however, the law by which the people are governed is mainly customary or

common law; and the fact that although the remoter sources of Hindu law are common, various schools have sprung up from them, leads naturally to the conclusion that the actual customs and usages of different localities may be still more divergent and at variance with the particular school of law generally prevailing there. The Privy Council, therefore has laid down the soundest principle that in India clear proof of custom overrides written texts of law,[1] in other words the Indian courts are bound to decide cases according to proved customs although they may be opposed to rules laid down in the authoritative commentaries. The view entertained by the Privy Council resembles that taken by German jurists, of customary law, and is opposed to that of Austin who maintains that the rules of customary law become positive law when they are adopted as such by the courts of justice or promulgated in the statutes of the State. But the great jurist's view which may be in perfect accordance with the state of society in England, is inapplicable to a country like India where there was no statute law, and the entire body of laws was based upon immemorial customs and usages. As regards the particular branch of law with which we are concerned, I have more than once observed that the special treatises which are regarded as the "written texts of law," contain restrictions that are opposed to the ancient and immemorial usages. I have already told you that so long as the twelve descriptions of sons were recognized, there could be no restrictions such as relate to the selection of the boy to be adopted by reason of certain relationship which he may bear to the adopter.[2] Hence the old state of things must be presumed to continue until this freedom of action be restrained by rules of binding force. Assuming that such rules are found in the special treatises on adoption, an important question arises as to what evidence should amount to clear proof in order to outweigh these written texts of law, when in opposition to them is set up the existence of customs, which is equivalent to the continuance of the immemorial ancient usages of the country. In ordinary cases a large number of instances in which the alleged custom has been followed must be proved in order to make out its existence. But the principle of that rule cannot legitimately be applied to cases of adoption; for regard being had to the character and age of these particular written texts and to the fact that they lay down ordinances opposed to the ancient and universal customs of the people, the question that may fairly and properly arise for consideration in such cases is, whether these written texts have really suppressed the old customs. Besides many known instances of the kind cannot be expected in a particular place when adoption itself has become so rare. It is moreover difficult to prove even a known instance, because men cannot be induced

[1] *Collector of Madura* v. *Mootoo Ramalinga*, 12 Moore's I. A. 436; 10 W. R., P. C., 17; 1 Beng. L. R., P. C., 1.

[2] Lecture I, pp. 24—25.

to publish before a court of justice what must be a defect in their title, in case the alleged custom fails in the opinion of the court, to be substantiated. For all these reasons a few instances should suffice to establish a custom of adoption, which, though at variance with the modern treatises, may be taken as a continuation of the ancient law. And if we look to the present state of the law relating to the Kritrima form of adoption, which according to the Sanskrit books stands precisely on the same footing as the Dattaka form in many important particulars, as well as to the admitted usages of adoption amongst the Hindus of Madras and the Panjab, and amongst the Jainas, we cannot help thinking that there should rather be a presumption in favour of the continuance of the ancient usages.

**Case-law.**—An examination of the different commentaries will convince you that on several points the rules of Hindu law were in a floating condition; and that on many points of detail, the Sanskrit works are entirely silent and furnish no information. The reported decisions of the superior courts have not only settled the ambiguous points, but have also developed Hindu law by supplying its deficiency, and have moreover modified it by engrafting on it rules based upon principles of equity. The administration of a system of law substantially ancient, by judges belonging to a highly civilized nation, could not fail to be attended with some changes. The usage of adoption is an ancient institution, which in modern times, has been replaced by the testamentary power. In Hindu law adoptions occupy the place filled by Wills which were unknown to Hindu law, but have now been engrafted on it by extending the power of gift. The law of adoption consists of two branches, namely, the conditions of a valid adoption, and the rights of an adopted son. As regards the latter, Hindu law was not very favourable to adopted sons, nor were its rules on the subject, clearly stated by the lawgivers; so there was a divergence of opinion amongst the commentators owing probably to the circumstance that an adopted son might be either a perfect stranger or a member of the adopter's family. This branch of the law has been modified and settled by conferring on an adopted son almost all the legal rights and privileges of a real legitimate son, by giving him in fact the same status in the family into which he is adopted, as he loses in the family of his birth by reason of adoption. Such a change as this, mitigating the seeming rigour of the law, would naturally be dictated by principles of equity and justice. As regards the other branch of the law of adoption, there are very few conditions imposed by the lawgivers and the commentators on general law, but they have been multiplied by the special treatises on adoption. Of the new rules introduced by the latter, some have not been enforced, but some have been adopted, while the scope of others has been extended owing to the vagueness of the rules themselves or of the translation. The effect of enforcing restrictions

such as are now accepted to be rules of legal obligation, has been to invalidate adoptions, to entail considerable hardship and ruin upon the persons pronounced to be illegally adopted, and to disturb the cherished arrangements made by deceased persons with respect to their property. If the restrictions be opposed to the ancient traditions and modern habits of the people, if some of them be not only unreasonable but appear to be merely directory, and if any one of them be the outcome of misapprehension of the books, then the propriety of adhering to them may fairly and legitimately be questioned, when the people are found to have been acting in contravention of them.

**Stare decisis.**—But the principle of *stare decisis* appears to present an insuperable bar to the review of a rule once laid down by the highest tribunals, and necessarily followed by the inferior courts, upon the ground that in the leading case an error has crept in on account of misapprehension arising from the imperfection of the materials from which the rule was deduced or from some other unavoidable cause. That there are reasons for the possibility of misconception is thus explained by the Privy Council[1]: "At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar." The precedents again, are locked up in a language which is not only foreign to the people, but which was until recently also unknown to the general body of the legal practitioners attending the Mofussil courts and even the Sudder Dewany Adawlut. The inevitable consequence has been, that in some matters while our courts of justice have been enforcing rules opposed to popular practice and feelings, and defeating the intentions of all the parties concerned in an adoption, by declaring it to be illegal at the instance of third parties; the people have nevertheless been following their own traditions and usages, and if aware of the precedents, have recourse to devices with a view to evade them and give effect to their wishes The only legitimate way for getting out of the difficulty appears to be to prove contrary usages,—a procedure, which though somewhat feasible now, was almost impossible some years back when the present facilities of communication between different places for collecting information were not in existence.

**Of twelve descriptions of sons, only Dattaka and Kritrima recognized.**—I have already pointed out to you in the last Lecture, how the subject of sonship has been dealt with in the commentaries, and I have shown that the opinion of the speculative writers, based upon the passage of the Áditya

[1] Runguma v. Atchama, 4 Moore's I. A., p. 1; 1 Pundit's Privy Council Digest, p., 313.

Purána and similar texts of doubtful authority, laying down that none but the *Dattaka* is recognized as secondary son in the present age, does not afford any evidence that the ancient usages had become extinct. But the European authorities having accepted the special treatises as the highest authority on the particular subject of adoption, and adopted the opinion of the Pundits consulted by them, came to the conclusion that the Dattaka son alone is recognized in all places, and the Kritrima son in Mithila and in the adjacent regions of Behar and Benares. Traces, however, of the continuance of ancient usages are discernible in the results of the enquiry instituted by them; this together with the facts that the two leading treatises on inheritance recognize all the forms of subsidiary sonship, and that some of them are not only unexceptionable on any grounds whatsoever, but appear to be the most natural and reasonable modes of affiliation, and are recognized by some of the later commentators, shows that it would be inequitable to invalidate any such affiliation if actually made. Before dismissing this subject, I think it necessary to make a few observations on some descriptions of sons, showing that the point is not quite settled yet.

**Appointed daughter's son, and Illatom son-in-law.**—According to the ancient law, cognates were not recognized as heirs at all,[1] therefore neither the daughter nor her son as such could inherit from the father or maternal grandfather respectively. Later on, their heritable rights have been recognized, but still according to the Mitákshará they are excluded by the agnatic relations of their ancestor, living jointly with him. They enjoy, no doubt, a better position under the Bengal school which does not recognize succession by survivorship, and supports the preferable position given to a daughter's son on the authority of texts that really relate to an appointed daughter's son. This rigour of the ancient law was softened by the fiction of appointment of daughters to raise issue for their father. A man destitute of male issue, but father of a daughter, used to give her in marriage to a bridegroom consenting to a stipulation, that the son borne by her should belong to the maternal grandfather. Such a stipulation, according to some sages, is implied if the father be sonless at the time of the daughter's marriage; accordingly, a man is prohibited to espouse a girl who has no brother.[2] Vasishtha goes still further, for he ordains that a daughter who has no brothers reverts as a son to the family of her father.[3] The distinctive feature of the arrangement appears to be that the appointed daughter instead of leaving her father's house after marriage, continued to live with him, and the son-in-law used to live as a member of his father-in-law's family. This practice obtains even now when a sonless man having a daughter is a wealthy person and an affectionate father. If a son is

[1] Manu, IX, 187-188.

[2] Yajnavalkya, I, 52-53.

[3] Vasishtha, XVII, 16; Colebrooke's Digest, V, 203.

born of her, then under the Dáyabhaga, he and his issue does not suffer much although he may not be regarded as the appointed daughter's son, except in the exceptional circumstances of his mother having a step-mother or of his predeceasing his mother and maternal grandmother. It appears to be quite natural and consistent with Hindu feelings that a daughter and a daughter's son should, under such circumstances, be allowed to enjoy the rights of an appointed daughter and her son. Considering the Mitákshará law of devolution of joint property, it would be manifestly unjust and unnatural should these rights be denied to them; for otherwise, the undivided coparcenary interest of their ancestor would pass to the surviving male members of his family, and his daughter and daughter's son living with him, would at most, if at all, be entitled to maintenance only. In the Drávira country this usage has assumed another form in the institution of Illatom son-in-law, which I shall discuss at length hereafter. Thus we find that the ancient practice still subsists, the reason for the institution still continues, and natural justice and equity call for its recognition; hence it appears to be extremely unreasonable to discard it, simply because some of the speculative writers who were neither judges nor lawyers chose to give prominence to a passage of the Áditya-Puráṇa, whereof the authority itself is questionable.

**Privy Council on Putriká-putra.**—The High Court of Bengal threw out an opinion against the recognition of Putriká-putra in the present age, in a case in which the point did not arise.[1] The question was raised before the Lords of the Judicial Committee, but it was not decided as the claimant was found to be not a Putriká-putra, and the following observations indicate the view their Lordships took, of the appointment of a daughter.[2]

"The other point which Mr. Leith raised was this:—That assuming the appellant, Jeebnath was not the nearest heir according to the ordinary rules of succession, he was made an heir by the act of Maharajah Sidnath Singh, who, he says, appointed a daughter, Jeebnath's mother, to raise a son to him; and he contends that by a rule of Hindoo law, a son of a daughter so appointed is entitled to succeed in preference to more distant male relatives; that a rule of law of this nature is to be found amongst old collections of Hindoo law appears to be established by the text to which Mr. Leith referred, but there seems to be an opinion amongst the text writers that that rule has become obsolete. In Sir Thomas Strange's book, under the head of 'Inheritance,' he thus speaks of it:—'Daughters.—The right of daughters to succeed in default of sons and widow, is not to be confounded with that of the appointed daughter under the old law; that appointment was one of the many

[1] Nursing Narain *v.* Bhuttun Loll, W. R., Gap number, p. 194.

[2] Thakoor Jeebnath Sing *v.* The Court of Wards, L. R., 2 I. A., 163; 23 W. R., 409; 15 B. L. R., 190.

substitutions for the son, and by fiction no longer subsisting regarded as one.' Then he says, referring to another custom :—'This is analogous to the law as applicable to the appointed daughter, but that substitution, with others of a more questionable kind, became obsolete.' In Sir William Macnaghten's Treatise on Hindoo Law, in the chapter on 'Adoption,' he says :—In former times it was the practice to affiliate daughters in default of male issue, but the practice is now forbidden. The other forms of adoptiou enumerated, by Manu appears to be wholly obsolete in the present age.' This appointment of a daughter may not be strictly an adoption, but the text writers evidently refer to this custom, amongst others, as being obsolete. It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the courts where this custom has been considered. But supposing it to exist, inasmuch as it breaks in upon the general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it.

"It is difficult to discover the precise ground on which the plaintiff originally based his claim. The plaint certainly does not state enough to bring him within the rules as laid down in Manu and in the Mitákshará. The plaint says this :—'Your petitioner's maternal uncle, Maharajah Luchmeenath Singh Bahadoor, agreeably to the counsel of his father Maharajah Sidnath Singh Bahadoor, having given in marriage your petitioner's mother, kept her under his roof, declaring and giving her hopes that, if a son be born to her, such son will stand in the relation of son's son to his mother's father, and that, if at any time occasion arise, he will observe the religious rites of sradh (obsequies), and keep the estate intact; and accordingly your petitioner, from the day of his birth to the present moment, lived with the deceased Maharajahs in common for all purposes of board, lodging and worship.' Now, in this statement it is not said that the Maharajah Sidnath by any act of his appointed his daughter, nor that the son, her brother, Luchmeenath Singh, did any formal act appointing her to raise a son to his father; the plaint says no more than that the latter gave her hopes that, if a son was born to her, such son would stand in that relation.

"Looking at the text, it seems not only that the act of appointment must proceed from the father himself, but apparently should be made by himself, because all the forms of expression which are given are those which it is supposed the father himself would utter. In Manu, the leading passage referred to by Mr. Leith in Chapter 9, Section 127, is :—'He who has no son may appoint his daughter in this manner to raise up a son for him, saying, the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies.' The passages in the Mitákshará are to the same effect. In chapter 1, section 11, clause 3 :—'The son of an appointed

daughter is equal to him,—that is, equal to the legitimate son. The term signifies son of a daughter. Accordingly, he is equal to the legitimate son, as described by Vasishtha :—This damsel, who has no brother, I will give unto thee decked with ornaments: the son who may be born of her shall be my son.—Or, that term may signify a daughter becoming by special appointment a son.' The last is not the present case. As their Lordships understand, what is set up is, not that the daughter became a son by appointment, but that she was appointed as a special daughter from whom might proceed a son who should stand in the place of a son's son. 'Still she is only similar to a legitimate son, for she derives more from the mother than from the father. Accordingly, she is mentioned by Vasishtha as a son, but as third in rank.' Then the note to that is:—'The Putrika-putra is of four descriptions: the first is the daughter appointed to be a son; she is so by a stipulation to that effect. The next is her son. He obtains, of course, the name of son of an appointed daughter, without any special compact. This distinction, however, occurs: he is not in the place of a son, but in place of a son's son, and is a daughter's son,'— that is, the son of a daughter who is herself appointed to be in the place of a son. Then there is this:—'The third description of son of an appointed daughter is the child born of a daughter who was given in marriage with an express stipulation in this form. The child which shall be born of her shall be mine for the purpose of performing my obsequies.' The attempt is made to bring the appellant within this third description of son of an appointed daughter. A special form of stipulation is given. It is stated that it must be expressed, and Manu also speaks of an express appointment proceeding in the same way from the father himself upon the marriage of the daughter. In this case no appointment was made by the father, and it certainly requires positive law or evidence of a custom from which the law may be presumed, that, supposing the rule still to exist that a father may appoint a daughter for this purpose, it is part of it that he may delegate the appointment to his sons. There is nothing said of that power to delegate being a part of the law, but, on the contrary, the rules as to the manner of appointment given in the old authorities point to the act proceeding personally from the father. The law as to adoption of sons bears an analogy to this, but the usages of that law cannot, without authority, be imported into this mode of appointment. These adoptions must stand upon the authority relating to each. In this case, there was no formal appointment by the father himself in his life-time, and no sufficient authority has been cited to establish that what was done afterwards can have the effect of making the son of the daughter, who appears to have been married with the consent of her brother upon the condition that the husband should live in the house, equal for the purposes of succession to the son of a son."

It may be mentioned in this connection that the Mitákshará and the Víramitrodaya the two leading authorities in the Benares school, by which the case before the Privy Council was governed, recognize all the descriptions of secondary sons; and the Vivádа-Tándava of Kamalákara, who was a Benares Pandita and contemporary of Nanda Pandita says, on referring to the text of the Áditya-Purána, that the term *aurasa* in that text includes the Putriká-putra. Bálambhatta the commentator on the Mitákshará, adopts the view advanced by that text, but maintains that it does not intend to prohibit the Putrika-putra, who again is not included by Manu in the catagory of secondary sons. It may also be observed that there is some distance between the obsoleteness and the illegality of a custom. It is also worthy of notice that the Jaina Shasters seem to recognize four descriptions of secondary sons one of whom is Putrika-putra.[1]

**Sahodhhaja or the son of a pregnant bride recognized by the Privy Council.**—Notwithstanding what is laid down by the commentators following the passage of the Áditya-Purána, and by the Dattaka-Mímánsá and the Dattaka-Chandrika, the Lords of the Judicial Committee appear to recognize the validity of the son of a pregnant bride in the present age.[2] Their Lordships' view is expressed in the following passages:—"Their Lordships think that the High Court came to a correct conclusion that a marriage did take place between the father and mother of the child prior to its birth; and, assuming that the High Court are correct in finding that the child, although born after marriage, was procreated or begotten before the marriage took place, their Lordships are of opinion that that court came to a right conclusion, in point of law, that the child was legitimate.

"The point of illegitimacy being established by proof that the procreation was before marriage had never suggested itself even to the learned Counsel for the appellant at the time of the trial, nor does it appear, from the authorities cited, to have been distinctly laid down that, according to the Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law, that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law is the same in that respect as the English law."

You will observe that the child in this case, undoubtedly falls within the definition of the son of a pregnant bride, and as such is not recognized in

[1] Vyavastha of Jaina Pundits, in the case from which appeal from original decree No. 223 of 1888, arose before the Calcutta High Court.

[2] *Pedda Amani* v. *Zemindar of Marungapuli*, L. R. 1, I. A., 287; 14 Beng. L. R., 115; 21 W. R., 358.

the *Kali yuga* according to the modern commentators. It is doubtful whether the attention of the Privy Council was invited to the real difficulty attending the question. But, however that may be, the ruling cannot be supported, unless it be assumed that the Privy Council refused to follow the rule based upon the text of the Áditya-Purána, and rested their judgment on the Mítákshará. It is also worthy of remark, that though the child was held in point of law[1] to be legitimate, it should not be confounded with what is called "true legitimate" or Aurasa son.

**Paunarbhava raised to the rank of Aurasa.**—I have already told you that although remarriage of widows was disapproved by the rishis, yet they recognized its validity; but they ranked the issue of such marriage as a secondary child under the name of Paunarbhava or son of a twice-married woman. Later on, the Áditya-Purána and other works that brought forward the theory of certain ancient practices being unfit for the Kali age, included re-marriage of widows as one of them. But notwithstanding, this usage has all along continued amongst some of the lower castes, and in particular localities, although it has become obsolete among the higher classes of the Hindus in most, if not all, places. A doubt was, in consequence, entertained whether remarriage of widows belonging to those classes amongst whom it had become obsolete, should be considered illegal, as it was held to be. A controversy was initiated by Pundit Iswara Chandra Vidyáságara who maintained that upon a true construction of the Shasters, re-marriage of widows cannot be held to be invalid in law; while his opponents contended upon the authority of the minor Puránas, that the ancient practice is forbidden in the present age. The effect of the discussion was that the Legislature was moved to pass Act XV of 1856, declaring such marriages to be perfectly valid. As regards the status of the issue of such marriages, Pundit Iswara Chandra Vidyáságara contended that in the present age it must be the same as that of the Aurasa son. On this point he met his adversaries with their own weapon: having established the validity of the re-marriage of widows upon the authority of a text[2] of the Institutes of Parásara, which is admitted on both sides to be declaratory of the law of the Kali age, the learned Pundit contended that as according to the Áditya-Purána and other works relied upon by his opponents, there can be only two descriptions of sons in the Kali age, namely, the Aurasa and the Dattaka, the issue of remarriage of widows must be regarded as Aurasa and not as Paunarbhava, the latter description of son being forbidden in the present age. The Legislature appears to have adopted the Pundit's view, and the effect of the provision of the Act has been to raise the Paurnabhava of the ancient law to the rank of the Aurasa.

[1] See Evidence Act, No. 1 of 1872, Section 112.

[2] Lecture iii, p. 100.

**Dattaka and Kríta sons.**—There is an interesting correspondence between Mr. Colebrooke, Sir Thomas Strange and Mr. Ellis about the legality in the present age of adoption by purchase.[1] Mr. Ellis maintained the affirmative on the ground of custom in the South; while Mr. Colebrooke took a contrary view solely based upon the later commentaries. The distinction between a given and a purchased son consisted in this that in the one case the natural parents transfer their parental dominion without consideration, and in the other for a valuable consideration. If the payment of any price or consideration by the adopter to the natural parents, have the effect of constituting the boy adopted a purchased son, then, practically speaking, all the adopted sons that are found at the present day would come under that category, except perhaps in those cases where the adopter and the giver are near relations. The result of Mr. Ellis's enquiry into the actual practice in the Dravira country on this point, appears to be the general usage in all the provinces; for parents that give their sons in adoption are in ordinary cases poor men in needy circumstances and cannot be induced, except for a valuable consideration, to part with their sons although their advancement on adoption by rich men may overcome the natural feelings revolting at the idea of perpetual severance of connection. But at the time when the discussion took place between the learned lawyers and scholars, slavery was a recognized institution, and this fact seems to have influenced Colebrooke's opinion on the particular point, and he refused to admit the validity of the usage which was in opposition to the law enunciated in the later commentaries. Now that slavery has been abolished there is no fear of any danger to the interests of a boy who is given in adoption for a consideration which may be looked upon as a conciliatory present and not as a price. Then again when we find the formalities of gift are observed notwithstanding the payment of price, the transaction may be regarded as a gift for a consideration, of a thing which possesses no marketable value. To hold an adoption invalid, as it has been held,[2] on the ground of a sum of money having been paid to the natural father to induce him to give his son for affiliation, would serve no good purpose, but only teach people to observe secrecy in the matter.

**Kritrima and Svayandatta.**—I have already told you that there is no substantial difference between the son made and the son self-given: in the first case the proposal for affiliation proceeds from the adopter; and in the latter, from the adoptee. Both of them must be orphans or destitute of parents,[3] and therefore *sui juris* and competent to dispose of themselves in adoption. It is difficult to understand the reason why one should be recognized and the other prohibited in the present age. Then again, why should not the Kritrima form

[1] Strange's Hindu Law, vol. II, p. 140, *et seq.*

[2] *Eshan Kishore Acharjea Chowdhry* v. *Hurish Chunder Chowdhry*, 21 W. R., 381.

[3] Mitákshará, I, 11, 17 and 18.

be permitted to Hindus in all parts of India, when the Dattaka-Mímánsá which recognizes this form of adoption, is supposed to be respected everywhere. There cannot possibly be an objection to the formation of an artificial relationship with the mutual consent of the parties concerned. But as the imitation of sonship in adoptions is inversely proportional to the age of the adoptee, these forms of affiliation may have fallen into disuse in consequence of the subjects of such adoptions being adults. It should, however, be observed on the other hand, that a man may like to adopt as his son a youth endowed with excellent qualities. One cannot fail, therefore to be struck with the absurdity of the rule prohibiting at the present day contracts of this kind, that were recognized in rude ages.

But, however unreasonable the rule may appear, it has been adopted and followed by courts of justice. Accordingly it has been held that amongst Hindus in the Presidency of Bombay, an adoption of a son self-given although he may at the time of the gift be an adult, is invalid in the Kali Yuga or present age;[1] and also that an orphan cannot be adopted.[2] You will observe that these rulings show that the Dattaka-Mímánsá is not respected in the southern countries, so far as the Kritrima form of adoption is concerned.

**Apaviddha and Pálak-putra.**—The Apaviddha is a son cast out by his father and mother and taken as a son by a protector, and resembles a Pálak-putra or a foster son of the present day, that appears to be a traditional relic of the ancient usage. A man may take pity on an orphan and helpless child, or feel great affection for a child of a near relation, and bring him up as his own child, in the latter case with the assent of the parents. "A boy maintained in the house, married and advanced in life, whether a son of a relation or stranger, is called Páluk-putra, and is not entitled to share in any property *de jure*."[3] "The Oudich (Kaletiya) Bráhmanas of Broach answered Borrodaile that either a foster son or an adopted son might be taken. He would share *equally* with an after-born son, and he might, failing any other son of his real father, take both estates (like a Dvyamushyáyana.)"[4] In the case of *Nilmadhab Dass* v. *Bissessur Dass*,[5] the Privy Council held that a Pálak-putra received with the consent of the real father, retained his natural relationship and could not be debarred from rights of inheritance in his natural family. It seems to be doubtful whether the term Pálak-putra used by Hindus should always be taken as equivalent to a foster son; and I shall show that it may

[1] Bashetiappa Bin Baslingappa *v.* Shivlingappa Bin Ballappa, 10 Bom. H. C. R., 268.

[2] Subbaluvammal *v.* Ammakutti Ammal, 2 Mad. H. C. R., 129; Balvantrav Bhaskar *v.* Bayabai, 6 Bom. H. C. R., O. C., 83.

[3] Steele's Law and Customs, p. 184.

[4] West and Buhler, p. 1213.

[5] 13 Moore's I. A. 85; 3 Beng. L. R., P. C., 27; 12 W. R., P. C., 29.

mean an adopted son as well. In the case before the Privy Council it was doubtful whether the son was a mere Pálak-putra or a Dattaka. It has been held that Hindu law does not allow the adoption of a Pálak-putra, only one form of adoption being recognized by the Bengal authorities.[1] Like Pálak-putras there may be Pálak-Kanyas or foster daughters or daughters by adoption.[2]

**Dattaka and Kritrima, the subjects of the modern law of adoption.**—The Dattaka form of adoption is, as I have already told you, the only form which according to all the later writers on Hindu law, is recognized in the present age. This view has been adopted by our courts of justice, and that form of adoption is now prevalent in all parts of India. The Kritrima form has now become a local usage principally of Mithila, where widows are held to be incapable of adopting in the Dattaka form. The rules regulating these two forms of adoption constitute the modern law of adoption, of which the principal topic is the Dattaka. It is worthy of remark that although according to the texts of the sages, as well as to the commentaries, the law relating to the Dattaka and the Kritrima son is almost the same in most particulars, yet the law relating to the latter retains its ancient simplicity, while that concerning the Dattaka son who is recognized by all the schools, has developed in a different way. With these preliminary observations, I now proceed to discuss the law of Dattaka adoption.

**Dattaka, Poshya and Pálak-putra.**—*Dattaka* is the word used in Sanskrit books, but the people of Bengal generally use the term Poshya-putra to designate an adopted son. It conveys the same idea as Pálak-putra, that is, one who is *maintained* and treated as a son, as distinguished from a real son. The words *poshya* and *pálaka* are both of Sanskrit origin and may be applied to any one of the different kinds of sons by adoption. The word *poshya*, however, does not occur in any of the Sanskrit books dealing with adoption; but the term *pálaka-pitá* is used in the Dattaka-Mímánsá[3] for adoptive father as distinguished from *janaka-pitá* or real father. Pálaka means protector or maintainer; but in the composite term Pálak-putra as used in ordinary language, the word does not convey that sense but its correlative. Hence you will observe that the word *pálak-putra* may be employed to mean a Dattaka son, and I am informed that it is so used by some persons and in certain places, and therefore it is not safe to rely upon a word like *pálak-putra* used in a document, for considering that the son intended is not an adopted son. In the case of *Nilmadhab Dass* already referred to, the opinion of the Privy Council that the son was not an adopted son, was to some extent influenced by the fact that the word Pálak-putra instead of Dattaka-putra had been used in a document.

[1] Kalee Chunder Chowdhery *v.* Shib Chunder, 2 W. R., 281.

[2] Steele's L. & C., p. 181, 186 and 231.

[3] Dattaka-Mímánsá, 2, 8.

**To whom does law of adoption apply?**—This question is not free from doubt and difficulty. The law of adoption is supposed to be intimately associated with Bráhmanism, or, the doctrine of spiritual benefit; but we have already seen that the doctrine had nothing whatever to do with the origin of adoption, and we also find the usage of adoption amongst the Jainas, the Sikhs, and even the Mahomedans of the Punjab, who do not believe that sons are competent to render any spiritual service to them; on the other hand, we find the falling off of the practice of adoption amongst the general body of the Hindus themselves. The law of adoption is found in the law-books of the Hindus, therefore *primâ facie* it applies to them. The hill tribes on the borders of India do not follow all the customs and usages of the Hindus, it is therefore doubtful whether they follow the usage of adoption; the fact that the usage of adoption obtained all over in ancient India, is no criterion for its continuance at the present time amongst all people. Actual existence of the usage is the sole test for determining whether the law of adoption applies to semi-Hindu and non-Hindu tribes in India. The law of adoption applies to Jainas and Sikhs, who are of Hindu descent, and having no separate law of their own, have been governed by the Hindu law. It has been held by the High Court of Bombay that it is not a necessary consequence of the circumstance that the spiritual motive for adoption has no influence on the Talabda Koli caste, that its members may not lawfully adopt.[1]

**Whether it applies to the Bráhmas and like.**—The history of the Bráhmas shows that they are Hindu dissenters, being opposed only to the caste system and idolatry, the former of which forms no part of religion and the latter is but a fringe of Hindu theology which is, as I have already shown, so fully diversified and exhaustive that no Hindu need renounce Hinduism for the sake of religion. They are Monotheists, and in one case[2] it was admitted that they are Vedantists; but the progressive Bráhmas sometimes say that they are eclectics in religion. However that may be, they have not renounced Hinduism except in a qualified sense, they live like Hindus, and in most respects think and feel like their ancestors. At any rate they are Hindus by descent, if not by creed, and therefore they are *primâ facie* to be governed by Hindu law, unless it be held that they are now amenable to the Succession Act. And if Hindu law applies to them, the law of adoption also will apply, notwithstanding their want of belief in the spiritual aspect of it. As regards Hindu converts to Christianity or Islamism, the case is quite different especially in the latter instance, for the Mahomedan law of succession and inheritance is intimately associated with religion. The Succession Act is theoretically the territorial law of India, but it was passed principally for the benefit of the Christians

[1] Bhala Nahana *v.* Parbhu Hari, I. L. R. 2 Bom., 67.

[2] Anund Coomar Gangooly *v.* Rakhal Chunder Roy, 8 W. R., 278.

and although Hindus, Mahomedans and Buddhists only were originally excluded from its operation, it has been found necessary to extend the exception to certain hill tribes. The Hindu converts to Christianity have not only renounced Hinduism in an unqualified manner but joined the Christian community of the descendants of Europeans, and so they may be considered to have ceased to be governed by Hindu law. But it is doubtful whether the same view may properly be taken of the peasant Christians in the moffussil, not a few of whom think that by becoming Christians they have added one more to the three hundred and thirty-three millions of Hindu gods.

**It was held not applicable to a Hinduised Koch family.**—A family took its origin in the Koch tribe of North Bengal, which was not Hindu originally but became subsequently Hinduised. The family retained, and was governed by, customs at variance with Hindu law. A question arose whether succession by virtue of adoption applied to such a family as this, and in the absence of proof that succession upon adoption had been introduced into it the Privy Council held, that title by adoption could not prevail.[1]

**Custom in a Hindu family barring adoption.**—The Sudder Court of Bengal allowed that, even in a Hindu family, there might be a custom which barred inheritance by adoption, and remanded the case for further investigation of the alleged custom.[2] The case related to an impartible estate. It appears to be just and equitable that the holder of an impartible *raj* or estate, devolving on him alone to the exclusion of other members of the family in pursuance of a family custom, should not have the power of adoption, so as to defeat the rights which the other members of the family may possess according to the Kuláchár, and pass the estate to a person chosen by him in the exercise of the power of adoption, who may be a perfect stranger to the family.

**Theory of sonship and adoption.**—According to both ancient and modern Hindu law sonship appears to be an office or status, and it does not carry with it the idea of procreation by the father; since the sons by birth, such as those blind from birth or labouring under similar disability, do not possess the status or quality of a son. The distinctive characteristics of the status are the capacity for performing the obsequies, and the right to inherit the estate, of the father.[3] Manu[4] and Atri[5] represent the subsidiary sons to the substitutes of the real legitimate sons: of the eleven kinds of substitutes the appointed wife's son, the appointed daughter, her son, unmarried damsel's son, twice-married woman's son, pregnant bride's son and adulterous wife's

[1] Fanindra Deb Raikat *v.* Ragiswar Das, I. L. R., 11 Calc., 463.

[2] Rajah Bishanath Sing *v.* Ramcharn Majmoadar, Beng. S. D. A. R., 1850, p. 20.

[3] Dattaka Mimánsá, Sect. II, 62.

[4] Manu IX, 180; Dat. Mim., I, 33.

[5] Cited in Dattaka Mímánsá, Sect. I, 3.

son are, according to the Dattaka-Mímánsá,[1] the principal substitutes by reason of their being connected in blood with either the legal father or his wife or both, and therefore resembling a real legitimate son; but the given son and the rest are secondary substitutes by virtue of the texts of law. A son, however, is not the end, but a means to an end; for there cannot be a substitute of an end. Absolution from debt and attainment of heaven form the end for which a son of the body is the primary means, and adoption is substitution of a secondary means on failure of the primary one;[2] it is in fact the appointment of a person to fill the office of a real son. But the fiction of Hindu adoption is supposed to be that the adopter procreated the boy on his natural mother.[3] There is, however, no foundation for such a fiction, except a passage in the Dattaka-Mímánsá, in which Nanda Pandita with a view to prohibit the adoption of some near relations, says that the boy to be adopted should have the capability of being begotten by the adopter through an appointment or the like.[4] But this passage can by no means support the theory of fictitious procreation. Besides such a theory is inconsistent with the admitted incapacity and rights of an adopted son. If the theory were correct he ought to retain his relationship with his *natural* mother and *her* relations, and he should offer oblations to *her* ancestors and inherit from them. But we find the law to be quite the contrary, for he is to offer oblations to his adoptive mother's ancestors,[5] and is entitled to inherit from her and her relations.[6] Hence if there be any fiction, it is that the adoptive father has begotten the boy adopted on his own wife and not on the boy's natural mother. In this connection it should also be borne in mind that according to Hindu law, a son's son and a son's grandson occupy in all respects the same position as a son, and are included by the term putra or son.

**Spiritual and secular objects of adoption.**—According to the two leading treatises on adoption, the object of affiliation is twofold, one is spiritual and the other temporal. A son is represented to be necessary for the attainment of a particular region of heaven, and for the performance of the exequial rites and of the ceremony of offering the funeral cakes and the libations of water, which are conducive to the spiritual welfare of departed spirits; as well as for the celebrity of name, for perpetuation of lineage, and for possession of the estate. The spiritual object may be attained by a man destitute of male issue through the instrumentality of other relations, such as the brother's

[1] Dattaka Mímánsá, Sect. I, 35.

[2] Dattaka Mímánsa, I, 41—52.

[3] Sir F. Macnaghten's Considerations on Hindu Law, p. 171.

[4] Dattaka Mímánsá, V, 16.

[5] Dat. Mim., VI.

[6] Kalikamal Mozumdar *v.* Umasankar Maitra, I. L. R., 10 Calc., 232.

son.[1] But the secular object cannot be gained except by means of a son real or adopted. Thus, the Dattaka-Chandrika says: "Although by reason of the ordinance that a fraternal nephew is the same as a son, he may be the means of procuring exemption, from exclusion from heaven, and so forth: still,—as the celebration of name, and the due perpetuation of lineage would not be attained,—for the sake of the same, his affiliation by adoption is indispensable."[2] With respect to this matter, Sir F. Macnaghten observes:—"Upon this particular point, the sum of all I have been able to collect out of books, or from living authorities, is, that in the three superior classes, if there be *brothers of the whole blood*, a son of *one* of them, *for religious purposes*, will be the son of *all*; and that, while this son exists, the childless brothers by the same father and mother need not adopt one for the performance of *sacred rites*. But that in a secular point of view, a male child is not considered as the son of his father's brethren—and that to take the heritage *as a son* of his uncle, he must be adopted; that, temporally considered, he does not, as a son, derive any benefits from them,—and that the son of a brother is *recommended*, in preference to all others, for adoption."[3] A man again that aims at *moksha* or liberation from transmigration, which is the highest spiritual end of Hindus, does not require a son for spiritual or temporal purposes, and therefore cannot adopt one.[15] The religious motive set forth in the special treatises, appears to have no hold on the general body of Hindus including the orthodox Pundits, who seldom if ever adopt sons. Adoptions are now confined to rich families, and it seems an irony of nature, that while a poor man's home teems with children, rich inheritances go a-begging for want of heirs, and the continuation of the richest families, is generally maintained by adoptions. The term 'celebrity of name' requires a few words of explanation: it is a general custom amongst the Hindus, that whenever a person is to be described whether in a private document or in a public proceeding, the mention of his father's name forms an indispensable part of the description; and this custom is recognized by the Legislature in some Acts which provide that Hindus are to be described in that manner. The present description appears to be a shorter form, for in religious ceremonies as well as in ancient documents we find a Hindu described by the mention of the names of his three paternal ancestors, and this accords with the Hindu theory that male issue includes three descendants in the male line.

**Predominance of secular object in adoptions.**—Although an adoption may be believed by those that adopt sons, to be necessary for the purpose of securing the performance of the rites of offering oblations of food and libations

[1] Dat. Mim. Section 2, paras. 29, 53 and 60; Dat. Ch. I, 21.

[2] Dat. Ch. I, 22.

[3] Considerations on Hindu Law, page 123.

[4] Víramitrodaya, page 115.

of water, conducive to the spiritual benefit; yet the absence of the practice amongst the general body of the people including the orthodox Bráhmanas, tends to show that the secular object of continuation of lineage has more to do with adoptions now made, than the religious one; regard being had to the fact that even some of the heterodox persons are found to adopt.

**Adoption of daughters.**—Nanda Pandita recommends affiliation of daughters, by those that are destitute of real legitimate daughters. He argues that peculiar spiritual benefit is derived from the gift of a daughter in marriage,[1] and from a daughter's son;[2] and that it is necessary to have both male and female children in order to secure against falling into a region of horror[3]; thence he concludes, following the analogy of affiliation of a son, that in default of a real daughter a substitute of a daughter should be made. He contends that it cannot but be admitted that there might be subsidiary daughters by operation of law, namely, the Kshetraja or appointed wife's daughter, that of concealed origin, the damsel's daughter, that of the twice-married woman, and the daughter of a pregnant bride, and he cites instances related in the Puránas and other works, of daughters affiliated in the different modes of adoption; and thus he obviates the objection based upon the absence of express texts of law, ordaining the adoption of daughters.[4] There cannot be any doubt that the same principles upon which the law of subsidiary sons is founded, apply to the adoption of daughters as well; and as regards affiliation by operation of law, there could be no distinction between the secondary sons and daughters. But with respect to the different modes of adoption depending on the choice of the adopter, there are cogent reasons for supposing that daughters were adopted very rarely in those modes. It should be observed that a daughter cannot serve the temporal purposes for which sons are adopted; and the adoption of a daughter for the purpose of making a gift of her in marriage is a spiritual luxury too costly to be attractive. The usage does not appear to have ever obtained in Hindu society, and therefore not expressly alluded to in any of the Codes, or commentaries. Nor has Nanda Pandita's recommendation met with the appreciation of the Hindu community. It serves, however, to prove that his views were purely speculative.

It was laid down by the Sudder Dewany Adawlut of Calcutta, following the Dattaka-Mímánsá, that "notwithstanding what is stated at page 102, Vol. I, of Macnaghten's Hindoo Law, the adoption of the daughter of a brother, on the condition that her eldest son shall be the '*putrika putra*' (son of a daughter) of the adopter, is legal, but it is necessary to the validity of such an adoptio

[1] Dat. Mim., vii. 1 and 16.
[2] Dat. Mim., vii. 16, 17 and 18.
[3] Dat. Mim., vii. 3 *et seq.*
[4] Dat. Mim., vii. 18—39.

that it should take place previous to her marriage."[1] In another case a similar contention was raised, but the High Court held that according to Hindoo Law a sister's daughter could not be an appointed daughter, or her son a *putriká-putra*.[2] There appears to have been in both these cases a confusion between a *putriká* and an adopted daughter, and between a *putriká-putra* and the son of an adopted daughter. If the Dattaka-Mímánsá be, as it has been, accepted as the paramount authority on all points respecting the law of adoption, then the adoption of a daughter if proved to be made, must be recognized as legal[3]; and her son, as a substitutionary daughter's son similar to an adopted son's son: but he can by no means be considered as a *putriká-putra*.

Adoption of daughters, however, prevails amongst the dancing girls, which I shall consider in a subsequent lecture.

**Adoption of Pautra and Pra-pautra or grandson and great-grandson.**—The adoption of a son by a sonless person is maintained by Nanda Pandita to be obligatory in a religious point of view, as a son is the means of attainment of heaven. To this an objection is raised apparently by his pupils, that if that be the principle of adoption, then it would follow that a person may adopt also a grandson and a great-grandson in default of real ones, for they have been declared to be the means of attaining immortality and the solar abode respectively[4]; and Nanda Pandita obviates the objection by conceding the power. There may be cases in which the adoption of a grandson instead of a son may be desirable: suppose a man who is a widower has a widowed daughter-in-law, as the only member of his family; should he be allowed in conjunction with his daughter-in-law to adopt a boy who is to be grandson to him, and son to the daughter-in-law, the arrangement would be the most perfect one. The same result would follow if in Bengal a widow might adopt a son with the assent of her father-in-law, as she may in the Presidencies of Madras and Bombay.

**Adoption, according to Nanda Pandita, is spiritually obligatory.**—Nanda Pandita argues that the duty of procreating a son is, according to the Sástras, imperative, and neglect to discharge the same is tainted with sin; hence a man destitute of a real legitimate son, is bound to adopt a substitute, and it is sinful to omit to do so.[5] Religious duties are divided into those that are *nitya* or imperative, and those that are *kámya* or optional: omission to perform the former is sinful, but as regards the latter, no sin is incurred by omitting to perform them, though a person may reap religious merit by performing them. The term *nitya*, however, is also used in another sense, to designate the imperative

[1] Nawab Ray *v.* Bhugbuttee Koear, 6 Beng. Sel. Rep., p. 5.

[2] Nursing Narain *v.* Bhuttun Lall, W. R. Gap number, p. 194.

[3] But see Gangábái *v.* Ánanta, I. L. R., 13 Bom., 690.

[4] Manu 9, 137; cited in Dat. Mim., i, 13.

[5] Dat. Mim., i, 5.

religious duties that a man has to perform every day, as distinguished from the *naimittika* or occasional rites that one must perform on certain occasions. But it should be observed that, however meritorious or spiritually imperative the possession of a son may be, it is not a legal obligation for a man to get or adopt a son.

**Factum valet.**—I have already told you that rules of legal and moral obligation have been blended together in the Institutes of Hindu law, and that the parts of them, dealing with positive law, also contain some rules that appear to be merely admonitory or recommendatory, and not mandatory or imperative. I have also pointed out that the leading commentators themselves draw the distinction and declare a few rules to be of moral obligation only. But at the same time, it seems that they have not always kept the distinction in view while discussing the texts of law, so as to point out all the rules that are intended to be merely directory; and the courts of justice have had to consider the question, and have pronounced a few rules to be of that character. The leading treatises on the particular subject of adoption, represent it to be more a religious than a temporal institution, and fetter it with restrictions conceived in a religious spirit, some of which have been decided to be of no legal obligation, so that adoptions which had already taken place in contravention of such restrictions, were held not to be vitiated on that account, according to the maxim, *Quod fieri non debuit factum valet.* This maxim, which means 'what should not be done is valid when done,' simply expresses the result, and affords no principle for discriminating between what *shall* be done and what *should* be done. According to English law the maxim is applied to rules relating to mere matters of form that become *ex post facto* immaterial.[1] A somewhat similar principle is discerned in the Hindu writings on religious rites which consist of many parts, where it is discussed whether a ceremony itself is vitiated by the omission or vitiation of any part; and the requirements are divided into primary and secondary ones, the former of which are considered to be indispensably necessary, and the latter immaterial so as not to affect its validity. But the rule is of wider application in this country, because there is a commingling of mandatory and admonitory rules in the works on Hindu law and more especially on adoption, which has been separately dealt with by the latest commentators who were concerned more with religion and morality than with law. It is now admitted on all hands that there are certain rules which are not legally obligatory; but the difficult question with respect to this matter is, how are we to differentiate between imperative rules of law and those that are merely binding on the conscience of men? The difficulty is enhanced by the fact that the forms of expression generally used in the Sanskrit books are the same whether legal or moral obligation be intended. So it becomes necessary to consider what prin-

[1] See Broome's Legal Maxims.

ciples have been followed by the commentators in declaring a precept to be of no legal force.

**Principle of the doctrine of factum valet according to the Dáyabhága.** There is fundamental difference between the Mitákshará and the Dáyabhága School in several important points: one of them is that right by birth, of male issue to the property of father or other ancestor, is not admitted by the Dáyabhága; and another point of divergence is, that co-heirs according to Jímútaváhana, can, under no circumstances take inherited property as joint tenants, but they always take as tenants in common, and the right of each of them exclusively accrues to a fractional portion of the joint inheritance, that is to say, to that share alone, which on partition should be allotted to him, although it remains unascertained and undistinguished during the joint state. It is necessary to bear these points in mind in order to understand the disquisition on the doctrine of *factum valet*. Referring to the following texts—"Separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole, to give, mortgage or sell it,"—the Mitákshará[1] says,—"Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since *the estate is common*." But the author of the Dáyabhága takes a contrary view, he cites that text and another,[2] namely, "A single parcener may not without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family,"—and maintains that these texts are not meant to invalidate the alienation, because in the instance of land held in common, as in the case of other goods, there equally exists ownership consisting in the power of disposal at pleasure; but that they exhibit a prohibition intended to show that it is sinful to put the family into distress by a sale or gift made to a person of bad character.[3] Then he cites another text which is relied on by the Mitákshará as an authority for the proposition that the father is subject to the control of his sons even in regard to his self-acquired immoveable property;[4] and which runs as follows,—"Though immoveables and bipeds have been acquired by a man himself, neither a gift nor a sale of them, (*should be made*) without convening all the sons:"—and says[5] that this passage must be interpreted in the same manner as the above passage; because in order to complete the sentence the word कर्तव्य (should be made) must necessarily be understood; therefore since the propriety (कर्तव्यता) of a gift or sale is denied, there is merely an infringement of the precept by making one, but the gift or sale is not invalidated: for (the nature of) a thing cannot be altered by a hundred texts.[6]

[1] Mitákshará, i, 1, 30.
[2] Dáyabhága ii, 27
[3] Dáyabhága ii, 27 and 28.
[4] Mitákshará 1, 1, 26.
[5] Dáyabhága ii, 29 and 30.
[6] The last sentence in Colebrooke's translation is, "a fact cannot be altered by a hundred

The argument of Jímútaváhana in these passages appears to be this. Ownership according to law consists in the power of dealing with the property, according to pleasure;[1] if a person be admittedly the owner of a property, then it follows that he is entitled to dispose of the property according to his pleasure by sale, gift or otherwise: a father acquiring immoveable property or a biped becomes its owner, so also a co-heir, of his share of the property jointly inherited by him and others: the father or the co-heir therefore is legally competent to make a valid gift or sale of such property. The precepts which seem to restrict their power of disposition, cannot alter the nature of ownership or of its legal incidents such as sale or gift, so as to invalidate the same: but they are to be regarded as merely admonitory and morally binding. These precepts are dealt with by the author of the Dáyabhága in the same way as conditions restraining alienation, and restrictions repugnant to gift are, in modern law.[2] Raghunandana one of the commentators of the Dáyabhága illustrates the passage "a thing cannot be altered by a hundred texts," in the following way:—"There is a special precept—'Slay not a Bráhmana,' but if a Bráhmana be slain, can the murder be undone, by that precept? It cannot do that. What does it then? It declares sin."[3] This gloss is liable to be misunderstood and likely to mislead. The writer endeavours to illustrate the meaning by an analogy drawn from a precept prohibiting the exercise by man, of his natural power in a particular way, and its incompetency to annul the effect of the particular exercise. You may punish the offender and compel him to perform a penance, but the act remains unalterable. Similarly when the law recognizes the power of a person to do a thing, and at the same time there are other precepts imposing conditions and restrictions based upon extraneous circumstances, inconsistent with the acknowledged power; the latter cannot have the effect of invalidating anything done in the exercise of the power. It is not, however, intended to be indiscriminately laid down that any act done by infringing a rule is valid, because it has been done. The doctrine of *factum valet* as enunciated in the foregoing passages of the Dáyabhága applies only when there is a sort of conflict of law, or inconsistency of a precept with the freedom of action that is a necessary logical consequence of an admitted legal right.

It is a matter of a very great doubt whether the doctrine does legitimately apply to alienation by a father of ancestral immoveable property. A father's rights to such property, according to the Dáyabhága, bear a close resemblance

texts." But the original is वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः: and वस्तु means a *thing* or *the nature of a thing*, but not a *fact*.

[1] Dáyabhága, 2, 27; Víramitodaya, i, 17.

[2] Transfer of Property Act, Sections 10 and 11.

[3] Sir F. Macnaghten's Considerations on Hindu Law, page 34; Pundit Bharatchandra Siromani's Edition of original Dáyabhága with six commentaries, page 67.

to a widow's rights to property inherited from her husband. The principal point of difference appears to be that the restrictions imposed on a father's right of dealing with ancestral immoveable property are intended for the benefit of his male issue, but those relating to a widow form the essence of the nature of her estate. The whole estate appears to be vested in the father as in the widow, and neither a son in the one case nor a reversioner in the other does appear to have any present interest in the estate, excepting perhaps the right to maintenance in the former case. Restrictions on the power of alienation are similar in both cases,[1] but in the case of a father, they become operative if male issue exist, whereas in the widow's case, their operation is not affected by the existence or non-existence of reversioners; a father, however, is declared competent to make a gift of a part of the ancestral immoveable property, not incompatible with the due support of the family. The sons have no right to demand a partition of ancestral property as against the father; it may, however, take place if the father chooses to divide such property, but he is not competent to distribute it unequally between his sons, though he is himself entitled to two shares, and the sons to one share each. This statement and comparison will enable you to understand the nature of a father's rights in ancestral immoveable property, and the difficulty in applying the doctrine of *factum valet* to an alienation of such property. But it has been applied, so that it is now settled that in Bengal there is no distinction between ancestral and self-acquired property, and the process of reasoning which led to this result appears to be the following:—Right to partition is an incident of co-ownership, but that right is denied to sons as against their father; hence it is inferred that sons have no right to ancestral property during the life of the father, who is therefore the sole owner of it, and this conclusion is supported by the fact that the father is declared competent to alienate a part; an alienation of the *whole* ancestral immoveable property is prohibited, on the ground that if permitted it would deprive the family of the hereditary source of maintenance; but that ground applies with equal force to the immoveable property acquired by a father himself who is bound to provide the family with maintenance; the prohibition against alienation, therefore is concluded to be of the same character, in both cases. There are, however, cogent arguments in support of the contrary view.[2] But the extension of the doctrine to ancestral property has not been followed with any appreciable evil consequence, the instincts of a father offering a sufficient guarantee to the protection of sons' interests. The doctrine, however, has not been extended to an alienation, by the widow, of the estate inherited by her. There is considerable difference between the Mitákshará and the Dáyabhaga school with respect to the widow's inheritance and to the nature of her

[1] Dáyabhaga Ch. ii, 23—26; Ch. xi, i, 56 and 60.

[2] Dr. Wilson's works, Vol. V, pp. 65, *et seq.*

estate. And Mitra Misra, the author of the Víramitrodaya maintains that the doctrine of *factum valet* does apply to an alienation by the widow, of her husband's estate, provided it be not made for an immoral purpose.[1] He quotes[2] the passages of the Dáyabhága bearing on the doctrine of *factum valet*, and argues that the doctrine therein explained is with equal force applicable to a sale or gift made by a widow; and he concludes thus: "Therefore, it is established that in making gifts for spiritual purposes as well as in making a sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; &c."[3]

**Doctrine recognized by the Mitákshará, origin of notion that it is not.**—I have already drawn your attention to the advanced legal ideas that are set forth in the Mitákshará, relating to the conception of law and the force of popular feelings in overriding rules propounded in the Sástras; as well as to its opinion that a certain precept is merely of moral obligation.[4] And I have also told you that it is erroneous to suppose that the doctrine of *factum valet* is peculiar to the Bengal school and is not recognized by the Mitákshará school. This erroneous impression appears to have originated from the divergent views taken by the two schools with respect to an alienation by a father of ancestral property, and by a co-heir of his undivided share in the patrimony. We have already seen that the texts prohibiting such alienation have been held by the Bengal school to be of moral obligation. But, according to the Mitákshará they are considered legally binding, and hence it is concluded that the doctrine of *factum valet* does not obtain in that school. This conclusion would have been correct, had the nature of the right of a father or a co-heir been the same in the two schools. But on the contrary, according to the Mitákshará, a father and his sons are co-owners of ancestral property, and co-heirs are joint tenants of the estate inherited from paternal ancestors; whereas according to the Dáyabhága, sons have no right to ancestral property during their father's life, and co-heirs are tenants in common and as such are severally sole owners of their undivided shares. There being thus a fundamental difference in principle on the two important points, *the thing* which *cannot be altered by a hundred texts*, is *non est* in the Mitákshará; for the estate being jointly vested in co-heirs, and father and son being co-heirs with respect to ancestral immoveable estate, none can have individually the right to deal with the property.

But with respect to a father's self-acquired immoveable property in which he has sole ownership, the Mitákshará substantially comes to the same conclusion as the Dáyabhága, notwithstanding the precept prohibitory of alienation without consent of sons. For, although the author cites that precept[5] in support of his

[1] Víramitrodaya, p. 141.
[2] Víramitrodaya, p. 138, *et seq.*
[3] *Ibid*, p. 141.
[4] Lecture, iii, p. 88.
[5] Mitákshará, I, 1, 27.

theory that sons acquire an imperfect right in their father's self-acquired property, yet as regards the father's right of alienation of such property he maintains[1] that a son has no right of interference, but on the contrary he must acquiesce in the father's disposal of property acquired by him. The crucial test of the applicability of the doctrine to an alienation, is the single ownership of the alienor. It is exemplified by what the Mitákshará says[2] with respect to the text prohibiting alienation of immoveable property even by one of separated kinsmen :—" But among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt, whether they be separated or united : it is not required, on account of any want of sufficient power, in the *single* owner ; and the transaction is consequently *valid* even without the consent of separated kinsmen." Thus the Mitákshará does, by implication declare the above two precepts to be directory only.

It must be admitted, however, that the Mitákshará does not express the principle of *factum valet* in the pointed manner in which it is enunciated by Jímútaváhana. But the principle appears to underlie several disquisitions in the Mitákshará. Sale without ownership is one of the topics of litigation in which a true owner may recover property which has been sold, given or pledged by a person who is not the owner. The Mitákshárá in dealing with this subject observes,[3] that a sale, gift or pledge by one who is not the owner is to be set aside, for the transferee cannot acquire any right from one who is not the owner. Revocation of gift is the next topic of litigation,[4] in which gifts are divided into four classes, namely, proper, improper, lawful and unlawful.[5] Sixteen descriptions of gifts are declared unlawful and they are such as are liable to be set aside by a court of equity ; and nine kinds of gifts are declared improper, in some of which the donor has ownership and in the rest he has possession but not ownership. The Mitákshará having described and explained the different kinds of gift, remarks that an unlawful gift shall be set aside, and concludes thus :—" Nárada ordains punishment for him who *accepts* an unlawful gift, and for him who *gives* an improper gift, in the passage,—' Whoever out of covetousness takes an unlawful gift and whoever gives an improper gift ;

[1] Mitákshará, 1, 5, 9—10.

[2] *Ibid*, 1, 1, 30.

[3] See Mitákshará on Yájnavalkya's Code, ii, 168.

[4] See Mitákskará on Yájnavalkya, ii, 175—176.

[5] The original words are देय, अदेय, दत्त and अदत्त, the last two words mean literally, *given* and *ungiven ;* and from the explanation afforded by the discussion of the subject it appears that *given* means lawfully given, and *ungiven* means what may be deemed ungiven by reason of being illegal, the first two words mean respectively what may or should be given and what may or should not be given : the words are ambiguous, but the context justifies the rendering I have given.

(they, *i. e.*,) the donor of an improper gift, and the donee of an unlawful gift are liable to punishment.'" On an examination of the rules laid down in these two topics of litigation, it appears that where the donor is the owner, a gift though improper is not invalid and not liable to be revoked, although the donor may be liable to punishment. And this view is supported by what the Mitákshará says in another place,[1] thus:—Punishment is ordained for the gift and acceptance of a thing which is not the property of the donor,—in the following passage,—"He who receives a thing which ought not to be given, and he who bestows it, both these are to be punished as thieves, and amerced in the highest penalty."—Hence it appears to follow by necessary implication that if the transferor has ownership in property, any transfer made by him is legally valid notwithstanding precepts forbidding alienation by reason of the existence of some extraneous circumstances such as the possession of children or wife.

I may give you another instance in which the Mitákshará declares one portion of a text to be mandatory and the rest to be directory. With respect to marriage Yájnavalkya ordains,—"Let him who has not omitted the duties of studentship, marry a damsel of auspicious parts, who has not been accepted or enjoyed by another, who is attractive in his sight, who is not a *sapinda* of his, who is younger in age, who is free from disease, who has brothers, whose father has not the same *gotra* or *pravara* with him, and who is beyond five degrees on his mother's and seven on his father's side."[2] The Mitákshará while explaining these passages, says that the status of the wife does not arise if the damsel be a *sapinda* or *samána-gotra* or *samána-pravara* of the bridegroom, and as regards the other qualifications, it is merely desirable that the bride should have them, but the marriage is valid notwithstanding their absence.

It is now settled by the Privy Council that the Benares school does to a certain extent recognise the doctrine of *factum valet*."[3]

**The word कर्त्तव्य, (Kartavya) in a rule indicates it to be directory.**— In the passages already referred to, the author of the Dáyabhága says that the word *kartavya* is understood in the text prohibiting alienation by a father of his self-acquired property; and bases his conclusion that the text is directory, upon the meaning of that word. We have therefore the high authority of Jímútaváhana for the proposition, that the word *kartavya* in a precept indicates that it lays down a rule of moral obligation. This appears to be supported by several texts containing that word, which are regarded as preceptive and not mandatory. For instance, the following text of Atri,[4]— "By a sonless man alone, a substitute of son *should be made* (*kartavya*)"—is certainly directory,

[1] See original Mitákshará on Yájnavalkya, ii, 24.

[2] Yájnavalkya, I, 52-53.

[3] Wooma Daee *v.* Gocoolanund Dass, I. L. R., 3 Calc., 587; 2 C. L. R., 51.

[4] Dattaka-Mímánsá, I, 3.

for a sonless man cannot legally be compelled to adopt a son; similarly, the following text of Saunaka,—"Adoption of a son, by Bráhmanas *should be made* (*kartavya*) from amongst *sapindas*; or, on failure of these, from amongst *a-sapindas*; otherwise let him not adopt,"[1]—has all along been held to be of moral obligation, adoption of an *a-sapinda* when a *sapinda* is available for adoption is perfectly valid, however improper it may be.

**Statement in a precept of the reason of the rule indicates it to be directory.**—The Mímánsá philosophy of Jaimini discusses the character of a precept setting forth the reason of the rule ordained by it. I have already pointed out to you[2] the importance attached by the Sanskrit lawyers to the rules of interpretation, laid down in the Mímánsá which has appropriately been described by Colebrooke as "the philosophy of law" illustrating "the logic of the law." The part of the work containing the disquisition[3] is called "the topic of precept with reason;" and the conclusion arrived at is, that the statement of the reason in a precept marks it as laudatory or recommendatory, and is intended to induce men to follow the precept which is not obligatory. You will observe, that if there is a body of rules some of which are mandatory and some admonitory, then the above canon of construction appears to be a perfectly legitimate and reasonable test for differentiating between them. When a person combines in himself the capacities of both a lawgiver and a moralist, and he intends to act in his first capacity it is sufficient for him to intimate his commands; but when he descends to give reasons for what he enjoins or forbids, it may very fairly be presumed that he is not imperative, but wishes to persuade people to follow his advice and recommendation, and not to compel them to act or desist. The following instance shows an application of the canon: the precepts enjoining the duty of adoption add that it should be made for the sake of oblations of food, libations of water, and exequial rites, as well as for perpetuation of name; so there is a statement of the reason for the injunction contained in the precepts which have therefore been always regarded as laudatory or recommendatory, and no man has ever been compelled to adopt.

**Applicability of factum valet to adoptions.**—The law of adoption which was founded upon the theory of property in a son, and consisted in a transfer of such property, is undoubtedly a survival at the present day, and has in consequence assumed a different character. But as the original theory of ownership in a son, is admitted by all the Sanskrit commentators excepting

[1] Dattaka Mímánsá, 2, 2.

[2] Lecture III, p. 74.

[3] Jaimini's Mímánsá, I, 2, 3; हेतुवचन-निगदाधिकरणम्, See Bengal Asiatic Society's Sanskrit Edition, pp. 53-55.

one[1] or two, the rules propounded by them must be considered, having reference to that theory. The principle of *factum valet*, which is applied to transfers of ownership in ordinary property, is, for the same reasons, applicable to an adoption consisting in the gift and acceptance of a son; and, judged by that principle, many of the unreasonable restrictions relating to affiliation, will prove to be recommendatory in character. But while some have been held to be rules of that description, others have been pronounced to be legally binding: it is not easy, however, to find out the principle upon which the distinction has been based.

**Caste-rules.**—The Smritis, which introduced, as I have already told you, the caste system, prescribe rules in detail regarding the relative position of the different castes, their respective professions and callings, and their several rights, duties, privileges and disabilities concerning both temporal and religious matters. With the majority of these ordinances, lawyers are not much concerned. But there are some caste-rules which a Hindu lawyer of the present day has to study; namely, prohibitions of intermarriage between the different castes and their subdivisions, a few rules of inheritance peculiar to one caste or another, and certain modern rules of adoption, prohibiting that to Bráhmanas which is permitted to Súdras. A discussion of the character of some of these rules and especially the last, has an important bearing on the subject with which we are concerned; and a brief account of the caste-system and its changes is requisite for understanding the nature of the caste-rules.

**Origin of castes.**—There being no rational principle upon which the hereditary caste system could be based, it is generally represented by Bráhmanas who are most interested in maintaining it, to be a divine institution established from the beginning of creation. But the sacred books do not agree as to its origin: the various accounts given of it by the different works of ancient Sanskrit literature have with considerable research been collected together by Dr. Muir in the first volume of his Sanskrit Texts; and the results of his enquiry are expressed in these words:[2]—

"The details which I have supplied in the course of this chapter must have rendered it abundantly evident that the sacred books of the Hindus contain no uniform or consistent account of the origin of castes; but, on the contrary, present the greatest varieties of speculation on this subject. Explanations mystical, mythical, and rationalistic, are all offered in turn; and the freeest scope is given by the individual writers to fanciful and arbitrary conjecture.

"First: we have the set of accounts in which the four castes are said to

[1] See Vyavahára-Mayúkha, Mandlik's Edition, p. 36.

[2] Muir's Sanskrit Texts, Vol. I, p. 159.

have sprung from progenitors who were separately created; but in regard to the manner of their creation we find the greatest diversity of statement. The most common story is, that the castes issued from the mouth, arms, thighs, and feet of Purusha, or Brahmá. The oldest extant passage in which the idea occurs, and from which all the later myths of a similar tenour have no doubt been borrowed, is, as we have seen, to be found in the Purusha Súkta; but it is doubtful whether, in the form in which it is there presented, this representation is anything more than an allegory. In some of the texts which I have quoted from the Bhágabata Puráṇa, traces of the same allegorical character may be perceived; but in Manu and the Puránas the mystical import of the Vedic text disappears, and the figurative narration is hardened into a literal statement of fact. In other passages, where a separate origin is assigned to the castes, they are variously said to have sprung from the words Bhúh, Bhuvah, Svah; from different Vedas; from different sets of prayers; from the gods, and the asuras; from non-entity (pp. 17—21,) and from the imperishable, the perishable, and other principles (Harivamśa, 11816). In the chapters of the Vishnu, Váyu, and Márkandeya Puránas, where castes are described as coeval with the creation, and as having been naturally distinguished by different guṇas, or qualities, involving varieties of moral character, we are nevertheless allowed to infer that those qualities exerted no influence on the classes in whom they were inherent, as the condition of the whole race during the Krita age is described as one of uniform perfection and happiness; while the actual separation into castes did not take place, according to the Váyu Puráṇa, until men had become deteriorated in the Tretá age.

"Second: in various passages from the Bráhmanas, Epic poems, and Puránas, the creation of mankind is, as we have seen, described without the least allusion to any separate production of the progenitors of the four castes (pp. 23—27, and elsewhere). And whilst in the chapters where they relate the distinct formation of the castes, the Puránas, as has been observed, assign different natural dispositions to each class, they elsewhere represent all mankind as being at the creation uniformly distinguished by the quality of passion. In one of the texts I have quoted (p. 27*f.*) men are said to be the offspring of Vivasvat; in another his son Manu is said to be their progenitor; whilst in a third they are said to be descended from a female of the same name. The passage which declares Manu to have been the father of the human race explicitly affirms that men of all the four castes were descended from him. In another remarkable text the Mahábhárata categorically asserts that originally there was no distinction of classes, the existing distribution having arisen out of differences of character and occupation. Similarly, the Bhágavata Puráṇa in one place informs us that in the Krita age there was but one caste; and this view appears also to be taken in some passages which I have adduced from the Epic poems.

"In these circumstances we may fairly conclude that the separate origination of the four castes was far from being an article of belief universally received by Indian antiquity."

It may be observed here that regard being had to the differences of character and occupation, the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of the society: next in importance are the royal class, the warriors on whom the protection and the very existence of the state depends, and who are characterized by physical agility, courage, administrative capacity and intelligence. Then come those concerned in the production of wealth by agriculture, trade, and cattle-breeding or cattle-tending, requiring intelligence, and a lower standard of morality. And lastly, the labourers serving the preceding three classes, or practising the mechanical or other similar arts, distinguished by their capacity for physical labour, and spirit of dependence. The virtues and qualities requisite for distinction in these occupations, as well as their importance to society, are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society and its different classes of members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution. The explanation of the mixed classes by supposing them to be the issue of intermarriage between the four tribes, appears to be a play of the imagination; where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation, were supposed to be descended from the offspring of an intermarriage of a man belonging to the one tribe, with a woman appertaining to the other. Thus the Ambasthas or the physician class of Bengal are imagined to be a mixed caste sprung from the issue of a Bráhmana father and a Vaisya mother. A physician resembles a Bráhmana in his general culture and learning, and also a Vaisya inasmuch as he does in a manner trade with his learning; and so the class is fancied to be descended from a combination of the two tribes, the worse quality being supposed to be derived from the original mother, and the better from the father. The principle of heredity underlies the system, and gained considerable support from the state of early society. And although all the arguments in its favour are based upon false analogy and opposed to experience, nevertheless the practical advantages and disadvantages of birth in particular families, due to extraneous circumstances may afford specious arguments in its support.

The four tribes and the mixed classes have subdivided themselves into numerous branches, each of which has constituted itself into a separated caste having no *connubium* with others. Each of these again divided its members

into Kulins and Mauliks. So that the spirit of caste or the principle of inequality of men has so thoroughly permeated Hindu society that there cannot be two men holding equal position. Even the Bráhmanas of Bengal are divided into three subcastes namely, Rárhíyas, Bárendras and Vaidikas.

**Privileges of twice-born tribes and disabilities of Súdras.**—The three superior tribes had the privilege of studying the sacred literature; and hence they are called twice-born. Vasishtha says,—"Bráhmanas, Kshatriyas and Vaisyas are twice-born; their first birth is from their mother, the second from the investiture with the sacred girdle; in that the sacred literature is the mother; and the teacher, the father."[1] They had also the privilege of performing sacrifices and religious rites. The Bráhmanas, however, reserved three special privileges for themselves, namely, the rights of teaching the sacred literature, of officiating as priests at sacrifices and ceremonies performed by any person, and of receiving gifts.[2] These were also the primary means of their livelihood from which the Kshatriyas and the Vaisyas were excluded.[3] Regard being had to the duties and disabilities of Súdras, as ordained in the Smritis, they appear to have been looked upon more like lower animals than human beings. To serve the Bráhmanas, Kshatriyas or Vaisyas, is represented to be the primary duty of a Súdra, and the means of his livelihood;[4] and if he could not procure service under the twice-born classes, then the practice of the mechanical arts is declared to be the secondary means of his subsistence. The Súdras are pronounced to be debarred from the study of the sacred books; it is declared that nothing is sinful in a Súdra, there is no sacrament for him, nor has he any right to religion; but he is not to be prevented if he chooses to perform religious rites,[5] which he may do but without sacred texts.[6] He is not to be permitted to amass wealth, when capable of doing so in a lawful mode;[7] and if he is possessed of wealth, a Bráhmana might according to his pleasure snatch away from him as much as he liked.[8] It is further ordained that no advice shall be given to a Súdra in any temporal matter, nor any religious instruction imparted to him, nor any penance directed to him; he who does so, falls into a lower region.[9] It should be mentioned in this connection that the position assigned to Súdras bears some resemblance to that of females belonging to the twice-born classes;[10] and that a member of the twice-born tribes is also declared to be incapable of performing religious rites before his *upanayana* ceremony, as he is on a level with a Súdra before his second birth consisting

[1] Vasishtha, II, 2-3; Sacred Books of the East, Vol. XIV, p. 9.
[2] Manu, X, 75-76.
[3] Manu, X, 77-78.
[4] Manu, X, 123-125 and 121.
[5] Manu, X, 126.
[6] Manu, X, 127.
[7] Manu, X, 129.
[8] Manu, VIII, 417.
[9] Manu, IV, 80.
[10] Manu, V, 155; IX, 18.

**Fusion of Bráhmanism and Buddhism into the Tántrika system of modern Hinduism.**—It is generally supposed that Buddhism has died out in India, but what appears to have really taken place, is a compromise between the two systems, and the modern Hinduism appears to be a combination of Bráhmanism and Buddhism. The learned Bráhmanas formed the intellectual aristocracy of India, whose religious duty and occupation required the cultivation of learning. To make the caste-system and idolatrous rites, consistent with Buddhism appears to have become the principal subject of their consideration, after it had established itself firmly amongst the lower tribes. They endeavoured to suppress Buddhism in various ways, but at the same time they found it necessary to make certain concessions in favour of all people. Buddhism is said to have been driven out of India, by Kumárila Svámin and his celebrated disciple Sankarácharya. The latter is the founder of two systems of religious fraternity, namely, the Vedántik and the Tántrika; the first is open to the twice-born classes only, and the second to all people without any restriction. The Tántrika system of religion introduced by Sankara and other champions of Bráhmanism declares the religious equality of all people, and in a manner converts the caste into a secular institution. The arguments advanced and the principles enunciated, though not always expressed, by them for effecting the purpose, appear to be substantially these. —The physical, intellectual and moral faculties are possessed in different degrees by different people, they are not equal in these respects, nor can all men hold the same rank in society, there must be distinctions between men; hence caste is a necessary institution. All people are not equally religious, nor capable of understanding religious truths in the same degree; a few only may be disposed to devote themselves entirely to religion; hence religious rites and festivities are necessary for the benefit of the ignorant people, who form the majority in society, and are incapable of appreciating higher truths of religion; for them, superstition and idolatrous worship are better than irreligion: therefore so long as you remain a householder, you must have caste and ceremonies, and also outwardly respect them for the benefit of the ignorant. But, within the circle of esoteric Tántrika worship you have no caste distinction, and if you wish to renounce the world and devote to religion, you are at perfect liberty to become an ascetic, and a member of the Tántrika religious fraternity where there is no caste.— Thus Bráhmanism has succeeded in re-establishing its influence in Hindu society, but with substantial modifications of its ancient principles. To the Súdras has been conceded the right to have all the religious ceremonies performed on their behalf by their Bráhmanical priests, in most of which they can take part like the superior tribes; but the Vedik mantras in their case, should be recited inaudibly, and in some instances Vedik words are to be replaced by different terms, whilst the Homa and the like ceremonies are to be vicariously performed by Bráhmanas as in the case of females belonging to the superior tribes. The right to the

*Upanayana* ceremony could not, however, be conferred on the Súdras. But to satisfy them a similar ceremony has been created for them. Upanayana means, presenting a boy to a Guru or preceptor of the Vedas, and the ceremony marked the commencement of study of the sacred literature; it has now become a farce even in the case of Bráhmanas, who learn a few sentences of the Vedas, and the period of study does not extend even to a week, within which the ceremony of Samávartana or return from the Guru's house, takes place, which, according to the ancient practice, could be done after the expiration of nine or twelve years at the lowest from the commencement of studentship. The Súdras have now the Díkshá ceremony, in which they learn one short sentence of the Tántrik mantra, from the Díkshá-guru, just as in the Upanayana ceremony Bráhmana youths are taught a few Vedik sentences, by their Guru or preceptor of the sacred literature. A student of the history of Bráhmanism cannot but admire the superior order of intelligence exhibited by the Bráhmanas who have succeeded in maintaining their pre-eminent position from the dawn of Indian civilization down to the present day; in fact, they are the glory of India, though they have ruined their country by their mistaken notions and pernicious policy.

**Modern Súdras: is their marriage licensed concubinage?**—The Súdras of the present day are not what they are depicted to have been in ancient times. The Súdras were, according to the original classification, either servants of the twice-born classes or persons practising the mechanical arts. They should not, however, be confounded with slaves, although the servile Súdras might, on account of their dependence, bear a resemblance to slaves. The slaves again were not necessarily Súdras, for admitting that the caste-rules relating to slavery, as found in the Institutes, were all observed, a Bráhmana could have a slave belonging by birth to any tribe; so a Kshatriya could have a slave who is either a Kshatriya or a Vaisya; and a Vaisya, one belonging to his own tribe. Thus there were twice-born slaves, who if emancipated would perhaps belong to their own caste. But, however that may be, the position of the castes has to a great extent changed, and it is not the same in modern times as is described in ancient law. The Súdra class appears to have absorbed the higher castes that had been converted to Buddhism. The discovery of writing and the cultivation of secular learning have also tended to raise the position of certain classes of Súdras. The Káyastha or the writer's caste[1] appears to owe its origin to the discovery of writing, and furnishes an instance in which a new occupation has created a new caste. This class appears to be nposed of men belonging to all the tribes, who adopted that particular

[1] The word Káyastha, कायस्थ is derived from काय the forepart of the hand, and स्था live; and its etymological meaning is, one that earns his livelihood by the forepart of his nd, with which he holds the pen. See Vishnu, 7, 3; Yájnavalkya, 1, 336; and Usanás, 1, 34.

occupation; the divergence of customs amongst different sections of them in several particulars leads to that conclusion. The story that the progenitor of that caste issued from all the parts of Brahmá's body may be an allegorical statement of that fact.[1] Some sections of the Káyasthas in Behar and the North-West Provinces wear the sacred thread, the distinctive sign of the twice-born classes; the period of pollution on the occasions of deaths and births is different amongst the different sections, namely, ten, twelve, fifteen or thirty days, the respective periods for the four tribes; but there is the anomaly that intermarriage takes place between families that have the sacred thread and those that have not. This practice, however, does not obtain between all the different sections. It is therefore doubtful whether all the Káyasthas are Súdras by origin. This class, however, has attained a position almost equal to that of the Bráhmanas, to whom the Bengal Káyasthas owe much for their elevation and culture. We have already seen, that the ancient disabilities, both secular and religious, have ceased to be applicable to modern Súdras; and the initiatory ceremonies are performed by the better classes of Súdras if not by all. But marriage amongst all classes of Hindus without any exception is solemnized with religious ceremonies. There are, however, passages in the Codes as well as in later works, from which it may be argued that the peculiar degree of sanctity attached to marriages does not apply to a Súdra marriage. For, amongst Súdras a Dasí-putra or illegitimate son begotten on a female slave is declared to be entitled to share with legitimate sons.[2] It may further be contended that as Súdras could not celebrate sacrifices, they could not have a *patní* or lawfully wedded wife. And upon these grounds Súdra marriages might be looked upon "as virtually no more than licensed concubinage."[3] With respect to this argument it should be observed that a Dási-putra of a twice-born man is declared entitled to maintenance, though not to a share;[4] it is therefore a question of degree; and a provision made for an illegitimate child can afford no argument against the character of Súdra marriages any more than against that of marriages amongst the superior tribes. Nor has the second argument any force, for whatever might be the actual state of ancient society, the religious disabilities of Súdras have long since ceased, not only in theory but in actual practice,[5] and they may have *Patnis* sharing in the fruits of religious ceremonies performed by them. Otherwise, the argument pushed to its logical consequences, must go to the extent of asserting that the wife of a Súdra

[1] See Súdra-Kamalákara where a passage giving that account, is cited from Padma-purána, but not found in most copies of that Púrana.

[2] Mitákshará, I, 12, 2; Dáyabhága, IX, 29-31.

[3] Gopal Narhar Safray, *v.* Hanmant Ganesh Safray, I. L. R., 3 Bom., 273 (289.)

[4] Mitákshará, I, 12, 3; Dáyabhága, IX, 28.

[5] See Raghunandana's Súdra-Kritya-Vicháraná; and Kamalákara's work on the same subject, called Súdra-Kamalákara.

can, under no circumstances inherit his property, for there is no commentator recognizing the succession of a wife who is not a *patní*. There are, undoubtedly passages in ancient law, as we have already seen, as well as in later Sanskrit writings, disparaging to the Súdra tribe which is represented as the servile class. A passage of the Brahma-Puráná[1] says that a Súdra who depends for his livelihood on others and is like a slave, cannot have a son, since the issue of a connection between a male and a female slave becomes a slave of their master. This is perfectly true if Súdras be regarded as slaves, for a slave is a sort of property belonging to his master, and as such cannot hold property and therefore cannot have *parentis dominum* over another as his son. But admitting that, of the Súdras those that served the superior tribes, held the same position as slaves, yet the reason is not applicable to all Súdras in ancient times, far less to the Súdras of the present day; since the condition and status of the different tribes have changed in the course of time, and neither the Bráhmanas nor the Súdras are now what they are depicted to have been in ancient times; service is no longer the monopoly of the Súdras nor is it their only occupation. It should be observed here that the prevailing impression that Súdras form the lowest class in the Hindu society, is erroneous, for, according to the Institutes, they appear to be superior to many of the mixed classes.

**Intermarriage and inter-adoption between different tribes.**—The European authorities have come to the conclusion, that if marriage between a man and a woman be not valid, the adoption by the man, of a son borne by the woman is not legal, when the adopter belongs to any of the superior tribes. Marriage and adoption, according to them stand on the same footing in that respect. Marriage of a man belonging to a superior tribe with a woman of an inferior class is recognized by the Institutes,[2] but they disapprove the marriage of a Súdra girl by a man of the twice-born tribes, especially by a Bráhmana.[3] The Codes are silent with respect to a marriage of a man of an inferior tribe with a damsel belonging to a superior tribe; and it might be inferred that a marriage of that description was not recognized. But such marriages seem to have been recognized, however disapproved they might be; because the origin of several mixed classes is attributed by Manu to marriages between men of inferior tribes with damsels of superior castes.[4] The law, however, has been understood to prohibit such marriages. As to intermarriage between a man of a superior tribe with a damsel of an inferior tribe, it is, as I have already said, expressly recognized by the Codes; but the Áditya-Purána enumerates it as one of the practices that should be shunned in the Kali age[5] and the present practice

[1] Cited in the Dattaka Mímánsá, 2, 81.
[2] Manu, III, 13.
[3] Yájnavalkya, 1, 56; Manu, III, 14-19.
[4] Manu, X, 11-13.
[5] See Lecture III, p. 95.

amongst the Hindus shows that this rule is generally respected and followed. Accordingly it has been held that in the absence of especial custom marriage between a Dome Bráhman and a Hári girl is invalid.[1]

But it should be observed that the validity of an intermarriage in which the husband belongs to a superior tribe is recognized by the Mitákshará, the Dáyabhága and many other commentaries. The passage of the Áditya-Purána is the only authority against the lawfulness of such marriage, and I have already discussed the nature of its authority, and the character of the rules which appear to be recommendatory only. It should moreover be observed that Hindu law bristles with passages declaring that a person of a higher tribe may degrade himself to a lower position by his misconduct.[2] A Bráhmana may now become a Christian or a Mahomedan, and so renounce Hinduism altogether; and the Hindu law declares that he may reduce himself to the position of a Súdra or to a still lower one. Suppose the Dome Bráhman in the above case, infatuated by his love for the Hári girl, threw off his sacred thread, partook of food prepared by Háris and chose to live as a Hári. The Hindu law cannot prevent it, why should then his marriage with the Hári girl be declared invalid? A marriage is no doubt disapproved when there is great disparity between the social position and rank of the parties to it, even by a society which does not recognize caste. But there is a wide gulf between the illegality of a marriage and its disapprobation by society. It appears to be unreasonable and hard to hold that the caste restrictions of the kind invalidate a marriage actually contracted and consummated, in contravention of them, and so to bastardize the issue. The only objection that might arise, if a contrary view were taken, is that if the issue of such marriage be declared legitimate, they may claim to inherit from the relations of their degraded parent. This is no doubt a difficulty, but it arises not from Hindu law but from the *lex loci* Act. Such a liberal view as this, however, is opposed to Hindu feelings; and as the marriage restrictions are rigidly observed in practice, cases of their violation, if any, must be very rare.

**Intermarriage and inter-adoption between different sub-divisions of the same tribe.**—There is no law prohibiting intermarriage between the different sub-divisions of the same tribe. The text of the Áditya-Purána forbids the marriage of a twice-born man with a damsel belonging to a different *Varna;* but the word *Varna* means any one of the four supposed original tribes. So the passage, if strictly construed, cannot be taken to forbid intermarriages between the different sub-divisions of the same caste, nor to apply to Súdras at all;

[1] Melaram Nudial *v.* Thanooram Bamun, 9 W. R., p. 552.

[2] Manu, ii, 168; x, 43, 92-93; xi, 98: Vasishtha, iii, 1-2; original Mitákshará on Yájnavalkya, i, 96.

although looking to the principle of the rule, it is reasonable to suppose that the mixed classes that are twice-born were intended to be included under it. Accordingly it has been held by the Privy Council that an intermarriage between different branches of the Súdra tribe is not invalid, there being no authority against its validity.[1] Following the principle laid down in this case, the Calcutta High Court have held that the adoption by a person belonging to one section of the Súdra tribe, of a boy belonging to another, is valid.[2]

But the general custom observed by these sub-divisions which have formed themselves into separate sub-castes, is that marriage is confined within each of the sub-castes, and there is no intermarriage between these different sub-divisions; though in the districts of Sylhet, Tipperah and Chittagong on the eastern frontier of Bengal, intermarriage between Vaidyas and Káyasthas, and between Káyasthas and Sháhus or vintners, is found as a special practice. And if this negative custom in matters of marriage can be the foundation of a legal prohibition, then intermarriage between the different sub-castes must be pronounced invalid. Accordingly Justice R. Mitter expressed an opinion that in the absence of special custom, intermarriage between different sub-castes, each of which observe endogamy, is not lawful.[3] But this view has been dissented from in a later case, in which it has been held that there is nothing in Hindu law prohibiting marriages between persons belonging to different sections of the Súdra caste.[4] When the law allows a wide field of choice, for contracting marriages, then the mere circumstance that certain families have for many generations confined their choice within themselves, cannot reasonably be taken to restrict the operation of the law, so as to make it illegal on the part of any member of those families to espouse one outside them but within the field permitted by the law.

All these caste restrictions relating to marriage, founded as they were upon the sense of honour of the particular castes, should be left for enforcing their observance to the moral influence of the castes themselves. The courts of justice will not be justified in enforcing their observance; since all that they may do is to declare marriages contracted in contravention of these rules to be invalid, and to bastardize the issue. Hindu law, however, armed the castes with sufficient power for enforcing the observance of restrictions like these by inflicting excommunication and degradation upon delinquents guilty of any breach of caste rules; but it was sensible enough to simply disapprove of such marriages, but not to invalidate them. The state of the law appears to be

[1] Inderun Velungypooly Taver *v.* Ramasawmy Talaver, 13 Moore's I. A., 141; 3 B. L. R., C., 1; 12 W. R., P. C., 41.

[2] In Regular Appeals, Nos. 274 and 322 of 1886.

[3] Narain Dhara *v.* Rakhal Gain, I. L. R., 1 Cal., 1.

[4] Upoma Kuchain *v.* Bholaram Dhubi, I. L. R., 15 Cal., 708.

most anomalous now. The *lex loci* Act has deprived the castes of the power they possessed under Hindu law for enforcing the caste rules; while the Civil Marriage Act provides that persons are only to declare that they have no faith in the Hindu religion in order to get rid of the caste restrictions that stand in the way of their union in marriage.

**Rules prohibiting to the twice-born what is permitted to Súdras, are recommendatory.**—There are many rules of Hindu law that apply to the Bráhmanas or the superior classes, but not to all classes nor to the Súdras, while the general body of the rules of jurisprudence applies to all classes alike. Restrictions that are common to all the castes appear to be of legal obligation, but those that are imposed on the superior classes alone, seem to appeal to their claim of superiority based upon purer conduct, for observing them. Anything done in violation of restrictions of that kind seem to be not invalid in law, although the person may fall in the estimation of his caste people. The restrictions relating to the choice of the boy to be adopted, appear to be rules of that description. They are not found in the Dharma-sástras, they were unknown to all the commentators that flourished before Nanda-Pandita, and they do not apply to the Súdras. They appear to be merely recommendatory, and not intended to invalidate an adoption after it has once taken place. Nanda Pandita also, who for the first time formulated those rules, does not seem to give them a higher character. The fact seems to be that with the disappearance of the original real principles of caste distinctions, have arisen these artificial restrictions of this kind, that are recommended to keep up appearances, but are not actually observed by the people who, ignorant of the rules, as well as of the policy of their leaders, act according to their natural inclination.

**Topics of the law of adoption.**—The law of adoption, as it is now administered in India, comprises the Dattaka form which is general, and obtains in all the provinces and amongst Hindus as well as some non-Hindus,—and the Kritrima form which is exceptional and confined to Hindus domiciled in a particular locality. It may accordingly be arranged and divided into the following topics for consideration, and I shall discuss them in the order in which they are set forth below, *viz.* :—

I. Capacity of males to adopt. } Who may adopt ?
II. Capacity of females to adopt. }
III. Who may give in adoption and who may be given ?
IV. Who may be taken in adoption ? Qualifications for being adopted.
V. Formalities and ceremonies necessary for a valid adoption.
VI. Effects of adoption on the status and heritable rights of the adopted.
VII. Effects of an invalid adoption, and litigation relating to adoption.
VIII. Kritrima adoption, adoption by non-Hindus, and special forms of adoption.

## LECTURE V.

## CAPACITY OF MALES TO ADOPT.

Capacity of males to adopt, unrestricted in ancient law—Rishis dissuade adoption by one having a begotten son—Nanda Pandita's view—Assent of the existing son—Double or plural adoption not prohibited—European authorities—*Rungama* v. *Atchama*—Consent of existing son—Subsequent ratification—Story of Devaráta—Usage of double adoption—Simultaneous adoption, a device to evade Rungama's case—Simultaneous adoption held invalid—Distinction between simultaneous and successive adoptions—Second adoption on death of first—Subsequent death of the first does not validate second—Is second adoption absolutely void?—Pregnancy of adopter's wife—Existence of a son *in embryo*, no bar to adoption—Existence of missing son—Of son adopting religious order—Of disqualified son—Of son renouncing Hinduism—Of grandson and great-grandson—Of brother's or daughter's son—Adoption by bachelor or widower—By a person in religious order—By a disqualified person—By an outcaste—By an idiot or a lunatic—By a man *in extremis*—By a leper—By a minor—Adoption during pollution—Effect of agreement not to adopt—Father's power to restrain son's capacity—Wife's assent.

**Unrestricted capacity of males to adopt, in ancient times, and the religious duty of having a son.**—Capacity to adopt a son, according to ancient law, was co-extensive with the right of owning and holding property. Adoption consisted, as we have already seen, in a transfer of parental dominion over a son, and founded upon the principle that a man could, like ordinary things, be the subject of proprietory right, and that parents became, in a natural mode, the master of the person of their children; and any person who was entitled to acquire and possess property in his own right, was also competent to have as many sons by adoption as he liked or had the means of securing. Males that were *sui juris* possessed an unlimited right in this respect, but females who held a lifelong status of pupilage and dependence could have only a qualified right, and their present capacity in this respect remains unchanged, as we shall see in the next lecture. A careful consideration of the eleven descriptions of subsidiary sons proves, as I have already told you, that the fact of a man being possessed of a son could be no bar to his having a secondary son, for such a man might have a Kánína or a Guddhája son. And this must have been the state of the law so long as the twelve descriptions of sons were recognized; and I may remind you they were recognized by the Mitákshára and the Dáyabhaga the two leading commentaries respected in other matters as most authoritative by the two schools respectively. The original principle of adoption, which was unconnected with religion, still subsists, at least as a survival; and the capacity to adopt, tested by that principle, is

purely a secular one, and it may accordingly belong to every man capable of accepting property, be he a minor or a bachelor or a widower,—a view adopted by some writers, as we shall presently see. But this secular right should be distinguished from the religious duty of having a son. I have already told you at great length that the sages discourage the affiliation of secondary sons, throw the secular aspect into the shade, and impress a new character on the relation between father and son by thrusting into prominence its spiritual aspect: they make it a religious duty for every man to espouse a wife and become a householder or Grihastha for the purpose of having a son of the body, and they recommend affiliation of a secondary son only in case of failure of a real legitimate son. Accordingly in this respect, the primary religious duty imposed upon man is to seek for a son of the body by becoming a householder on marriage; and if he fails to get a son, he is then both entitled and bound in the religious view to adopt one as a substitute for the primary son: and in this view a bachelor is incompetent to adopt. This distinction of the civil and the religious right of adoption should be kept in view, as it may throw some light on certain points. It should moreover be remembered that though adoption of a son resembles acceptance of a chattel, yet the former differs very materially from the latter in this important particular, that an adoption fixes the adoptive father with grave liabilities; as for instance, a person governed by the Mitákshará reduces his right to ancestral property by adopting a son, who at once becomes his co-heir with co-equal right to property of that description. It is therefore necessary to bear in mind while considering the capacity of a person to adopt, that an adoption is not the performance of a mere religious duty, nor an acceptance of an ordinary gift, but is also a transaction seriously affecting his property.

**Sages dissuade one having a real son from adopting.**—The rishis recognized, as we have already seen, the ancient usages relating to sonship, though much disapproved, and some severely condemned by them. They did not prohibit the affiliation of any description of son, nor did they forbid adoption by a man having a real or secondary son. But they discouraged affiliation of a secondary son by a person having a real legitimate son. Thus Atri says,[1]—"By a sonless man alone should a substitute of son be always made: with some one resource, for the sake of funeral cake, libations of water, and exequial rites." So Manu declares,[2]—"A son of any description should anxiously be adopted by a sonless man, for the sake of funeral cake, libation of water and exequial rites; and for the celebrity of his name." For the purpose of correct understanding the meaning of these texts, you should bear in mind the c

[1] Dattaka-Mímánsá, 1, 3; Dattaka-Chandriká, 1, 3.

[2] Dat.-Mím., 1, 9; Dat.-Chand., 1, 3; not found in the present redaction of Manu, see ix, 180.

tinction between 'son' and 'substitute of son.' The primary meaning of the word *puttra* is a real legitimate son,[1] and the term "substitute of son" means any one of the eleven descriptions of secondary sons who are declared substitutes of *puttra*, that is to say, of the Aurasa or real legitimate son. Thus Manu says,[2] "These eleven descriptions of sons, beginning with the Kshetraja or appointed wife's son, as have been described above, are declared *substitutes* of Puttra or son, so that failure of exequial ceremonies may not happen." So also Vrihaspatí declares,—"Of the thirteen sons, who have been described by Manu, in their order, the Aurasa and the Putriká are the cause of lineage; but, as linseed oil is substituted by the virtuous in the absence of clarified butter, so are the eleven sons *substituted* in default of the Aurasa and the Putriká."[3] It follows therefore by necessary implication that they are substitutes for the real legitimate son. The foregoing two texts relating to the duty of adoption by a sonless man, contain two rules, one of which is positive and directly expressed, and the other is negative and necessarily implied; they enjoin a *sonless* man to adopt a son, and therefore by implication forbid a man having a son to do the same. Both the positive and the negative rule, however, must be taken to be of the same character; and therefore as you cannot construe the duty of adoption by a sonless man into a legal obligation, for you do not compel every sonless man to adopt one, neither can you legally prevent a man having a son from adopting another; since, if one of the rules be of moral obligation, the other also must be of the same character, the two being intimately connected with each other. Hence the meaning of the above passages of Manu and Atri, and of other texts to that effect is, that a man having *a son of the body* in existence *should* not adopt a son; they cannot properly be construed to forbid a second adoption by one having the first adopted son in existence, or to invalidate such second adoption.

**Nanda Pandita prohibits adoption by one having a son of the body.**—Referring to the above text of Atri, Nanda Pandita observes that the word 'sonless' (*aputra*) indicates one to whom no son was *born* or whose son has died,[4] and that the particle 'alone' in the phrase 'by a sonless man alone,' signifies the incompetency of a man having a son, to adopt. Taking these remarks together with the explanation given above, it appears clear that he means to prohibit adoption by a man having *a real legitimate son.* If any doubt be entertained as to the correctness of that meaning, it is set at rest by what the author says in another place with regard to the relative rights of a eal son and a son adopted notwithstanding the former's existence:[5]—"The

[1] Lecture II, p. 58.
[2] Manu, IX, 180.
[3] Vrihaspati, cited in Dattaka-Chandriká, 1, 8.
[4] Dat.-Mim., 1, 4.
[5] Dat.-Mím., 6, 1-2.

meaning is, that if a real legitimate son exists, the adopted son is not a sharer of the wealth: for, in the affiliation of a son, the non-existence, even of an *aurasa son* is an essential condition." The Dattaka-Chandrika also appears to express the same view.[1]

**Except with the consent of the real legitimate son.**—But in laying down the above rule, Nanda Pandita had to meet a weighty objection, since his rule is opposed to the indication of law, afforded by the instance of adoption of Devaráta by Visvámitra already father of a hundred sons, recorded in the Aitareya Bráhmana, a portion of the Vedik literature. He at first attempted[2] to explain away the difficulty by contending that the foregoing passages of Atri and Manu are sufficient to override that exceptional instance; but being pressed apparently by his pupils[3] concluded[4] by saying that if you contend that greater respect is due to the canon of construction according to which an indication furnished by direct revelation (Sruti) is of higher authority than a revelation inferrible from passages of Smriti, then I accede that, let a man possessed of a son, adopt one with the sanction of the former, on account of the indication afforded by a passage of the same direct revelation in which the instance in question is recorded.

**Neither sages nor commentators prohibit an adoption in the lifetime of an existing adopted son.**—There cannot be any doubt that the word *puttra* which, according to the sages as well as to the commentators, primarily signifies a real legitimate son, is also sometimes used so as to mean the secondary sons. Hence the reasonable mode of interpretation would be that in the absence of anything contrary to the subject or context, the word *puttra* must be taken to mean a real legitimate son. The Dattaka-Mímánsá invokes the well known canon of construction, namely, "In a precept, the sense of a term is not secondary," for supporting his view that the word 'father' in a certain precept means the real and not the adoptive father;[5] and in another place[6] Nanda Pandita contends that the term *puttra* in a certain text must be taken in its primary sense of a real legitimate, and not in the secondary sense of an adopted, son. Accordingly, in all the precepts relating to the incapacity for adoption, the term 'sonless' must mean "destitute of a real legitimate son;" and this meaning is also supported by the context itself; for in the proposition 'a *puttra*-less man shall adopt a substitute of *puttra*,' the word *puttra* appears to import the same meaning in both places, and in the second instance it cannot but be taken in the sense of a real legitimate son. But it must be admitted that canons of construction, and arguments like the above, are not always th

[1] Dat.-Chand., 1, 3-8.
[2] Dat.-Mím., 1, 10-11.
[3] Indicated by the word चोदनायाम् in the original.
[4] Dat.-Mím., 1, 12.
[5] Dattaka-Mím., 6, 28.
[6] Idem, 2, 40.

safest guide in ascertaining the real views of the rishis, unless they are corroborated by other circumstances. In the present instance, however, the above meaning is supported in various ways. The sages who recognized eleven descriptions of substitutionary sons, could not lay down that a man having a secondary son shall not have another, when the having such a son did not in several instances, depend upon his will. Besides, many sages recommend and praise the possession by a man, of many sons. Thus Atri says,—"The departed ancestors of a man long that many sons may be born to him, hoping that even one may go to Gaya;" and to the same effect are passages in Vishnu and Vrihat-Parásara; while Vrihaspati and Likhita declare,—"Many sons are to be desired, so that even one may travel to Gaya."[1] No doubt, the former passages expressly refer to begotten sons, but the latter, in which the words are general, cannot be taken to imply the same meaning. Besides the reason of the precept applies as well to adopted as to begotten sons. It may be said that to have more sons than one is a spiritual luxury: but why should a man be debarred from having it, if he can afford to secure that luxury? Hence in whatever way you consider the subject, you cannot conclude that the sages prohibit plurality of adoptions.

The commentators on the law of inheritance, also, do not appear to have introduced any restriction of that kind. As to the Mitákshará and the Dáyabhága, which deal with partition of heritage between the different descriptions of secondary sons, and with their respective shares, it is clear that the idea did not occur to their authors that a man could have only one secondary son, and not more than one living at the same time. We may therefore leave out of consideration other commentators of the same kind, and confine our attention to the Dattaka-Mímánsá and the Dattaka-Chandriká. The following passage of the former work shows that a second adoption is not invalid by reason of the existence of the first adopted son:—"Next, should an Aurasa and a Dattaka, or should a Dattaka and a son adopted without observance of the prescribed form be co-existent, the same author propounds succession to the estate,—'Him existing,—a son being created; and a Dattaka existing, one being adopted without observance of the prescribed form; that estate is his, who is master of the father's wealth by his status.—The meaning is that, 'him,' *i. e.*, the real legitimate son 'existing,' whatever son is created by acceptance and so forth; of these, to him only, who is master of the father's wealth 'by his status,' *i. e.*, by his own status,—does that estate belong; not to the other; if a real legitimate son exist the adopted son is not a sharer of the wealth; for, in the affiliation of a son the non-existence even of real legitimate son is an essential condition. Likewise, the meaning is, 'a Dattaka,' *i. e.*, one adopted according to the prescribed form,

[1] For reference to these texts, see Lecture I, p. 26, note 2.

'existing,' should a son 'be adopted without observance of the prescribed form:' of these also, the Dattaka only is sharer of the estate, not the son adopted without observance of the prescribed form, for the prescribed form alone produces the filial relation."[1] According to this passage the conditions of a valid adoption are the non-existence of a real legitimate son, and the observance of the prescribed form discussed by the author in the next preceding section. It follows, therefore, by necessary implication that, if one Dattaka son being in existence, another son be adopted with the observance of the prescribed form, such adoption is perfectly valid. After discussing the formalities for adoption, the author concludes[2]:—"Therefore, the filial relation of these five sons proceeds from adoption only, with the observance of the form prescribed by either Vasishtha or Saunaka; not otherwise;" and later on he observes,[3]—"It is therefore established, that the filial relation of adopted sons, is occasioned only, by the sacramental ceremonies; of gift, acceptance, burnt sacrifice, and so forth, should either be wanting, the filial relation even fails." These passages clearly indicate that the observance of the prescribed forms of adoption creates change of paternity and filial relation. The author of the Dattaka-Chandrika also appears to entertain the same view:[4] for he cites the same text in support of the propositions, that a son adopted when an Aurasa son exists is not entitled to a share, and likewise a son adopted without observance of the prescribed ceremonies, also, is not entitled to a share; but he as well as Nanda Pandita maintain that the latter is entitled to wealth sufficient for his marriage. On a consideration of these passages, the question naturally suggests itself,—By what right does he become entitled to his marriage expenses? The real view entertained by these authors appears to be that mere gift and acceptance are not sufficient for a perfect adoption, which, according to them, requires the observance of the prescribed ceremonies; and without them, the adoption is imperfect but not absolutely null and void. The son adopted becomes the adopter's son, but like a son adopted from a different tribe,[5] is inferior in status, and as such is excluded from participation of the estate, though entitled only to marriage expenses and to maintenance; since he cannot confer spiritual benefit. It should, however, be mentioned here that in the course of the arguments advanced by Nanda Pandita for refuting the position that a fraternal nephew becomes a son without adoption, he observes that the singular number in the compound word, 'a substitute of son,' in Atri's text,—(By a sonless man alone should a substitute of son be made)—is significant, and implies the unity of

[1] Dattaka-Mímánsá, 6, 1-4. The above rendering is slightly different from Sutherland's.
[2] Dattaka-Mímánsá, 5, 50.
[3] Idem, 5, 56.
[4] Dattaka-Chandrika, 6, 3; Dat.-Chand., 6, 3; Dat.-Mim., 5, 45-46.
[5] Dat.-Chand., 6, 4; 1, 14; Dat.-Mim.

the object of adoption. But this observation taken together with the context appears to be directed against simultaneous adoption by the same person, of more sons than one, and not against successive adoptions.[1] There are again, a few Sanskrit writers of inferior note,[2] who take the word 'sonless' in the above text in the general sense of 'destitute of any description of son,' and maintain that a person having an adopted son cannot adopt another. It should moreover be observed that neither Nanda Pandita nor any other previous commentator does *expressly* say that a person can adopt a second son, when the first adopted son exists. But looking to the past history of sonship, the absence of such express provision does not raise any difficulty. Some later writers, however, have expressly dealt with this matter. Jagannátha is of opinion that the adoption of a son given, although a son of the body be living, is valid and he shall be entitled to a third share in the same manner as a given son, subsequently to whose adoption a son of the body is born.[3]

**Difference of opinion between European authorities.**—The European authorities who spared no pains to come to a correct conclusion on all points of Hindu law, laboured under great difficulty; they were neither familiar with the actual customs of the people nor acquainted with all the works on law. Most of them had to depend on the translations of the few Sanskrit books and on the opinion of Pandits. The translations are sometimes vague, and cannot always exhibit the force and exact meaning of the original; and the Pandits, like other experts, could not be found to agree, though the preponderance of their opinion was in favour of plural adoptions. It is therefore natural that there should be a difference of opinion among the European authorities on a question like the present. The misconception appears to have mainly arisen from a want of discrimination between the two meanings of the word *puttra* rendered into 'male issue, issue or son,' and assumed to include both begotten and adopted sons in the texts bearing on the subject. The Hindu law of adoption again is a survival of an ancient usage, and could not commend itself at all to civilized people, were it not in some degree beneficial to those that are its subjects; and considering the serious consequences of an adoption on the status of the infant who is for ever severed from all his relations in the family of his birth, any one would naturally feel inclined to construe the law most favourably to him, so as to guard his interests in the family into which he is admitted. Abstractly thinking, unrestricted power of adoption is likely to be most prejudicial to the first adopted son, and may operate with great hardship; for, the natural safeguards of love and affection being wanting in

[1] See W. Macnaghten's Hindu Law, Vol. II, 181; case VII, on Adoption.

[2] Dattaka-Tilaka; see Dattaka-Siromani, p. 30, and Lecture IV, p. 126.

[3] Colebrooke's Digest, Vol. II, p. 393 (Madras edition).

his case, if he incur the displeasure of the adoptive father, it may be followed by a second adoption reducing his rights and interests if not superseding him altogether. The manner in which Roman fathers treated their adopted sons might have some share in influencing European opinion on this subject.[1] Thus, there being cogent *primâ facie* reasons against the power of double adoption, there is an instinctive opposition to it. Those that are against double adoption have come to regard the power of adoption as a special gift of law, and require express authority conferring such a power. But the correct view appears to be quite the other way; for the power of adoption, like the power of holding property, is not the creature of the Codes of Hindu law; and unlimited capacity in these respects is assumed in all the Sanskrit treatises on law. But the law simply professes to impose restrictions regulating the power. You cannot therefore impugn the validity of an adoption unless you show that it violates an *express restriction*. Accordingly those that maintain the lawfulness of double adoptions, say that there is no authority prohibiting it. The difference of opinion amongst the European authorities on this point, is due, to this fundamental difference of doctrine. The majority of them think that double adoption is invalid, because there is no *express authority* recognizing it; and this view has been adopted by the Judicial Committee. I may tell you here that all the passages of the two leading treatises, bearing upon the question, do not appear to have been noticed by the European authorities. I need not point out the divergent opinions on the subject, nor earlier cases on the same, as they have all been noticed and discussed by the Lords of the Judicial Committee in the leading case on this point, and I am just going to cite the part of the judgment bearing on the question of successive double adoption.

**Successive double adoption held invalid by the Privy Council.**—*Rungama* v. *Atchama*,[2] was the first case going up to the Privy Council, in which the question arose "as to the validity of a second adoption, the first adopted son still existing, and remaining in possession of his character of a son." The facts in this case were that one Vencatadry, together with his wife adopted a son named Jaganatha, then married another wife, and together with her adopted Ramanadha when the one first adopted was existing. It was held that the adoption of Ramanadha was invalid, and their Lordships delivered the following decision on that important question:—

"This appears to have been long a point of great doubt in Hindu law, and is stated by the judges in this case, to be unsettled.

"Three classes of authority have been referred to:—First, the opinion of the Pundits, appearing in the course of the proceedings; secondly, the native

[1] See Sootrugun Sutputty *v.* Sabitra Dye, 2 Knapp's Reports, p. 287; 5 W. R., P. C., 1 ).

[2] Rungama *v.* Atchama, 4 Moore's I. A., 1; 7 W. R., P. C., 57.

authorities, as found in the Hindu treatises; and thirdly, the European authorities.

"First. As to the *Pundits;* there is considerable difference of opinion amongst them. If the appellant's evidence is to be believed, a number of *Pundits*, and learned men, gave their opinion against the validity of the adoption, to Vencatadry, in his lifetime, and this at a period when their bias would probably be, to favour the wishes of the powerful Rájá who consulted them.

"On the death of Vencatadry, there is a certificate signed by one hundred and forty Bráhmans, that the adoption of Ramanadha was invalid. But as this was an opinion produced by Jaganadha, then in possession of the estate, but little weight is due to it.

"On the other hand, in 1818, before the institution of this suit, by Ramanadha, the Northern Provincial Court took the opinion of their own *Pundit*, and of the Pundits of the Centre and Southern Division of the Courts on these questions:—

"'1. Is a person having, conjointly with a wife, adopted a son, and thereafter being displeased with her, and marrying a second wife, authorized by Hindu law, jointly with her, the second wife, to adopt a son?

"'2. A person adopting a son, having for any reason, adopted a second son, is the former or the latter heir to the estate of the adopting, or are both sons entitled to share the same?'

"These *Pundits*, being at a distance from each other, giving separate opinions at some intervals of time, without, as it appears, any communication between them, all agree in holding, that the second adoption is good, and that both sons are equally entitled to inherit. These opinions seem to be as free, as any opinion can be, from suspicion of undue influence.

"When the case came before the Sudder Court, two of the *Pundits* consulted were in favour of the adoption, and one against it. The reasoning of the two *Pundits* in favour of the adoption is certainly very unsatisfactory; but still, so far as the law is to be collected from the opinion of *Pundits*, to be found in this case, the proponderance is in favour of the adoption.

"These opinions, however, are by no means conclusive, and appellants contend, that the native authorities, upon which they are founded, are strongly against the validity of second adoption.

"These authorities, like the opinions of the *Pundits*, are not reconcileable with each other.

"In the Digest of Hindu Law, on Contracts and Succession, with Commentary by Jagannatha, translated by Mr. Colebrooke, the question is discussed and treated as one on which a difference of opinion prevailed. The most material passages of the Treatise are found in pages 386, 389, 395, 397. The author holds the better opinion to be, that an adoption is valid, although a

previously adopted son, or even a natural born son, be already in existence; the main foundation of that opinion being an ancient text. 'That many sons are to be desired, in order that one may travel to Gaya.'

"It was attempted, in a most ingenious argument, on behalf of the appellants, to reconcile this authority with others, apparently of a different tendency, by showing that the author intended, not that many sons of the same description might be adopted, but that he referred to sons of different descriptions, of which there were twelve, recognized in the remote ages of Hindu antiquity, though only two are now allowed; the son given, and the legitimate son. Another suggestion was, that the author intended only that the second adopted son may have the rights of a son, in the event of the failure of the existing issue, natural or adopted.

"We find great difficulty in adopting either of these suggestions. At the same time it must be owned, that the doctrine is not very clearly stated, nor very easily to be reconciled with some of the authorities to which it refers; and with respect to the right of inheritance of the second son, we rather collect the author's opinion to be, that the second son would succeed, as in the case of a son well adopted, by one having no issue, to whom a son is afterwards born, *viz.*, to one-third only of his father's estate.

"Whatever, however, may be the effect of this practice, its authority is far outweighed by two other Hindu works, expressly on the subject of adoption, the *Dattaka-Mímansá* and the *Dattaka-Chandrika.*

"The first passage sec. 1, plac. 3, in the former of these works, is the citation of a text of an ancient sage, *Atri*, in these words:

'By a man destitute of a son, only, must a substitute for the same always be adopted.' This, perhaps, standing alone, may be held to mean that upon such a one only was it incumbent to adopt a son. The commentary, however, excludes this construction, for it says, sec. 1, plac. 6, 'By a man destitute of a son only. The incompetency of one having male issue is signified by the term *only* in this passage.' The author then, after quoting a text from Manu, much to the same effect with that cited from Atri, observes, that the instances of adoption, by certain illustrious persons, of sons, although they already had male issue, must be considered as exceptional cases, and not as generally authorising the act. In the next paragraph (12) the author seems to concede, that a second son may be adopted, with the sanction of the existing issue.

"The *Dattaka-Chandrika* (sec. 1, plac. 3) cites the same text from *Atri* and *Manu*, and puts the same construction on them, as the *Dattaka-Mímansá.*

"We think that these treatises are more distinct than the work of Jaganatha: they are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India; and their weigh is strong against a second adoption.

"In the ordinances of Manu, translated by Sir William Jones, we find this passage, in page 313: 'He, whom his father, or mother with her husband's assent, gives to another as his son, provided[1] the donee have no issue, is considered as a son given.'

"In the Vivadarnava Setu, translated by Mr. Halhed, ch. XXI, sec. ix, the proposition is distinctly stated, "He who has no son or grandson or grandson's son' or brother's son, shall adopt a son; and while he has one adopted son, he shall not adopt a second.'

"If we are to form our opinion of the law, from the effect of these authorities, we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption.

"At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar.

"It is satisfactory, therefore, to find that, under the third head to which we have adverted, the European authorities, there is much assistance to be derived from the labours of those who have investigated the subject, with all those advantages of familiarity with the laws and languages of Hindustán, in which we are necessarily deficient.

"Here, unfortunately, as everywhere else, there is some discrepancy in the authorities.

"Sir Thomas Strange, in his Elements of Hindu Law, Vol. I, p. 78 (2nd edition,) expresses himself as follows :—'In general it is in default of male issue that the right is exercised, issue here including a grandson, or great-grandson. But as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorized; so, even when the first subsists, a second may take place, such having been the pleasure and will of the husband; upon the principle of many sons being desirable, that some one of them may travel to Gaya, a pilgrimage considered to be particularly efficacious in forwarding departed spirits beyond their destined place of torture'. In support of these propositions, he refers to two cases, Shamchunder *v.* Narayni Debi (1 Ben. Snd. Dew. Rep., 209) which was decided in 1807; and Goureepershad Rai *v.*

[1] The literal meaning of the original of this clause is "in distress"; most commentators e lain it as meaning "at a time of famine and the like," whilst some add "or the giver l ıg sonless," but it can by no means be put as a condition, and even then the word 'son- l ı' means, destitute of a real son. The original is one word, namely, आपदि.

Mussummat Jymala (2 Ben. Sud. Dew. Rep., 136), which was decided in 1814.

"Now, the first of these cases decided only that a second adoption is valid, when the first adopted son has died without issue; a point of law which is not disputed. In the second case, a man having two wives, gave authority to each of them, to adopt a son. One of them made the adoption. He himself, together with the other wife, afterwards made an adoption; and it was finally held, that the two sons were entitled equally to inherit to the husband.

"This was a very peculiar case: it certainly seems to assume the validity of a double adoption; but the doubts in the case seem to have been, rather as to the effect of the second adoption, by the husband himself, in revoking the authority given to the wife, than on the validity of a second adoption, while a first adopted son is living. This decision is also stated by the Court, to be in conformity with the preceding case of Shamchunder *v.* Narayni Debi, which, in truth, for the reason already mentioned, it in no degree supports.

"These, we believe, are the only European authorities referred to, on behalf of Ramanadha. With reference to these cases, it may be observed that they have never been considered as settling the law upon this subject. In a note to the case of Narayni Debi *v.* Hirkishor Rai (1 Ben. Sud. Dew. Rep., 42), which, it seems, was supplied to the reporter by Mr. Colebrooke, the translator of Jagannatha's Digest; he states the point as one of doubt, and on which, although the authority of Jagannatha was in favour of the adoption, the weighty authority of the *Dattaka-Chandrika* was the other way.

"Every European, without any exception, as far as we have any information, who has since examined the subject, has come to a conclusion adverse to the second adoption. In a note to Strange's Elements of Hindoo Law, Vol. II, p. 85 (2nd edition,) the law is thus stated by Mr. Sutherland, a very high authority:—'A Hindoo cannot have legally adopted children; a son legitimate or adopted existing, any subsequent adoption would be invalid; at least the son so adopted could not inherit.'

"In Mr. Sutherland's Synopsis of the Hindoo Law of Adoption, p. 212, he thus expresses himself:—'The primary reason for the affiliation of a son, being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son of a deceased father, in which the salvation of a Hindoo is supposed to depend, it is necessary that the person proceeding to adopt should be destitute of male issue capable of performing these rites. By the term issue, the son's son and grandson are included. It may be inferred, that if such male issue although existing, were disqualified by any legal impediment (such as loss of caste,) from performing the rites in question, the affiliation of a son might legally take place.'

"In Mr. Steele's Synopsis of the Law of Hindoo Castes, he states, p. 48 –

'An adoption can take place only where, no begotten son or grandson exists, or where the begotten son has lost caste.' Again at p. 52:—'In the case of the death of an adopted son (and total loss of caste is considered equivalent to death), another may be selected and given in the same manner; but a man, after adopting one boy, cannot adopt another, at the desire of a second wife, &c. Only one adopted son can subsist at one time, B. S. (mit.') It is true that the treatise purports to relate to the customs of the Provinces of Bombay; but we are not aware of a difference between the different Provinces, on this point, though there appears to be some minor differences, on other points of the law of adoption, and for this the last section of the *Mitákshará* is referred to. The last paragraph, in this page seems to be the statement of different opinions collected from different quarters, and, as might be expected, not very well agreeing with each other.

"But by far the most important authority is Mr. William Macnaghten, whose Principles and Precedents of Hindoo law were composed, as appears from the preface, after collecting all the information that could be procured from all quarters, and after a careful examination of all the original authorities and of all the opinions of the *Pundits* recorded in the Supreme Court, for a series of years.

"This work was published after his report of the two cases already referred to, and of course he could not but be acquainted with them; indeed, he refers to one of them. Now Mr. Macnaghten states the law, as he considers it to be, without the slightest doubt or hesitation. He says, Vol. I, p. 80, 'It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another.' And he examines the text, that 'many sons are to be desired, in order that one may travel to Gaya,' and says that it applies only to natural born sons.

"We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr. Macnaghten's is constantly referred to in the Supreme Court, as all but decisive of any point of Hindoo law, contained in it, and that much more respect would be paid to it, by the Judges there, than to the opinions of the *Pundits*. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring as he does entirely in the law, as stated in Macnaghten.

"The Judges in the Sudder Court state, that they are aware that this has been long considered a doubtful point, and they seem to proceed entirely on the pinion of the *Pundits*, who favour the second adoption.

"On examining the reasons assigned by those *Pundits*, they rest upon two ıain points:—'First. The text that 'many sons are to be desired, in order ıat one may travel to Gaya.' 'Second. Upon the do c ine, that he who has nly one son is to be considered as childless.

"Now, the first of these texts is evidently out of the case, if Mr. Macnaghten's explanation be correct; and as to the second, in referring to the passages on which the *Pundits* rest, they manifestly relate, not to a person who receives a child, but to one who gives a child in adoption.

"Upon the whole, therefore, for these reasons, (which, as the point is of great general importance, we have thought it advisable to explain very fully,) we have come to the conclusion, that the adoption of Ramanadha was not valid, and the judgment of the Sudder Court upon that point must be reversed."

This doctrine has necessarily been followed by all the Courts in India,[1] and re-affirmed by the Privy Council in the case of *Gopeelal* v. *Musst. Chundrabolee Buhoojee*.[2]

**Exception in favour of second adoption with consent of existing son.**—The Privy Council in its judgment notices the concession made by Nanda Pandita in favour of an adoption made with the consent of an existing son, and proceeds to consider whether this exceptional rule could maintain the title of the second adopted son in that case. So, the authority of that rule was accepted and acted upon by the Privy Council, and it remains unaffected by any later decision. In the following passage their Lordships discuss the rule and its character:—

"Feeling the hardship of this case on Ramanadha, we have looked with some anxiety to see whether his title could be maintained, on the ground, that it was subsequently recognized by Jaganadha, and that such subsequent recognition might be considered equivalent to previous assent.

"We think it, however, impossible to maintain his right upon this ground. Supposing Jaganadha to have acquiesced, after he came of age, in the division of property made by Vencatadry, it was an acquiescence on the footing of a right already asserted by the father, to exist in Ramanadha, and it does not appear that Jaganadha possessed all the knowledge, or was placed in the circumstances which must exist, in order to make his ratification binding, even if we assume, what is not by any means clear, that such subsequent ratification would be equivalent for that purpose, in Hindu law, to previous consent."

**Whether consent includes subsequent ratification?**—There is no instance of a second adoption with the previous consent of an existing son. Besides in cases of double adoption, the one first adopted is generally an infant when the second adoption takes place, he is therefore legally incapable of giving his assent to a transaction which is manifestly prejudicial to his interest.

[1] Joy Chunder Rau *v.* Bhyrub Chunder Rau, Bengal, S. D. A. R., 1849, p. 461; Sudanun Mahapatter *v.* Bonomallee, 1 Marshall, 317.

[2] Gopeelal *v.* Musst. Chundrabolee Buhoojee, L. R., S., I. A., 131; 11 B. L. R., 391; 19 W. R., 12.

Cases of subsequent ratification by conduct are sometimes found; and if such ratification be equivalent to the consent which, according to Nanda Pandita, legalizes the second adoption, it may prevent great hardship on the second adopted son whose adoption after a series of years may be declared invalid by reason of the existence of a son at the time of his affiliation. The Privy Council, however, have left that question undecided, though it is somewhat important. I may therefore add a few explanatory remarks upon it. The whole matter depends upon the Vedik story[1] of Sunahsepha's adoption by Visvámitra, which compelled Nanda Pandita to concede the validity of an adoption made during the life of an existing son, and from which he deduces the condition consisting in the existing son's assent. It would not, therefore, be out of place to relate here shortly the story itself, which throws some light on this point as well as on certain others.

**Story of Sunahsepha Devaráta's adoption supports the affirmative.**—The story of Devaráta's adoption as given in the Aitareya Bráhmana, and Vasishtha's Code may be briefly stated thus:—Rájá Harischandra made a vow to the god Varuna, that if he got a son by his favour he would offer the son as a victim to that god. A son was born to him, but as he was unwilling to sacrifice the son, he postponed the fulfilment of his vow on one pretext or another, and at last the god consented to his proposal of sacrificing a secondary son in lieu of his begotten child. For that purpose he purchased Sunahsepha the second son of Ajígarta, who had three sons; the first son being dearest to the father and the third and youngest son being so to the mother, they sold the second son, who became a son bought to the Rájá. A sacrifice was commenced in honour of the god, and Sunahsepha was tied to the sacrificial post: but when everything was ready for slaying him as victim, he began to chant a hymn praising a certain god who appeared and directed him to praise another deity; in obedience to the direction he sang another hymn praising that god, who appeared and advised him to adore some other god; this process was repeated and he chanted many hymns in honour of different gods, which you will find compiled in the Rigveda and recorded in his name as the rishi of them, and the last of which was addressed to the god Varuna, to appease whom he was to be slain. The god appeared, spared his life and released him from the bondage. Sunahsepha thenceforward acquired the name of Devaráta which is equivalent, as Professor Max Müller says, to 'Theodotus.' Sunahsepha was then requested by the priests who were struck with his extraordinary power of composing ext apore hymns for pleasing the gods, to assist them in completing the sacrifice, a d he exhibited his remarkable skill in that respect. After the completion of t e sacrifice he sat on the lap of Visvámitra one of the officiating priests, a :ording to the story as given in the Aitareya Bráhmana. This, taken together

[1] This is not a Pauránik story as is supposed by Mr. Mayne, § 97, of his valuable work on l du Law.

with what follows no doubt, indicates that he thereby offered himself to become his son and was accepted as such. But Vasishtha supplies an intermediate episode; while describing the self-given son, the sage remarks,—"That is explained by the story of Sunahsepha. Sunahsepha, forsooth, when tied to the sacrificial stake, praised the gods; then the gods loosened his bonds. To him spoke each of the officiating priests, 'He shall be my son.' He did not agree to their request, then the priests came to the agreement, 'He shall be the son of him to whom he offers himself.' Visvámitra was the Hotri priest at that sacrifice. He became his son."[1]—Then, according to the story as in the Aitareya Bráhmana, his natural father requested him to come back to his family, but he rejected the offer. Sunahsepha then asked Visvámitra, that he, being a stranger by birth, what will be his position in his family as his son? Visvámitra answered, that he will have the position of his eldest or first-born son. Thereupon he asked Visvámitra to declare this in the presence of his existing sons, apparently with a view to prevent any future dispute. Whereupon he convened all his sons and directed them to accept Sunahsepha as their senior brother. Visvámitra had a hundred sons, of whom the older fifty did not like the idea, and were in consequence cursed by their father; but the younger fifty said, —"What our father tells us, in that we abide; we place thee (Sunahsepha) before us and follow thee." The father being pleased by this answer, blessed these younger sons.

Nanda Pandita cites[2] the passage containing the answer of the younger fifty sons of Visvámitra, for supporting his view that the story of the adoption, as related in the sacred literature indicates it to have been done with the assent of his sons. His pupils, however, contended that that regards the giving to Devaráta the rank of eldest son; and you are now in a position to judge whether the story supports the master or his pupils. We must, however, accept Nanda Pandita's view for our present purpose. Because we are concerned with the story solely with a view to see if it can throw any light on the question, whether the condition of an existing son's assent for legalizing the adoption of another son, is satisfied by subsequent ratification of the existing son. Now, the story tells us that the father's act of adoption preceded the assent of his sons; hence this is an instance of subsequent ratification. Therefore, the rule which Nanda Pandita deduces from the story, and which is couched in general words, should be construed in the light of the story well-known to him and his pupils. And by that light, it is clear that subsequent ratification is equivalent to previous consent in the present connection.

**Usage of double adoption by men having two wives.**—It is worth of remark that the judgment of the Judicial Committee in the case of *Rungama* v. *Atchama* shows, that one important feature of the case was not

[1] Vasishtha, XVII, 33-35.

[2] Dattaka-Mímánsá, 1, 12.

presented to the Court for their consideration, namely, whether the fact that the first adoption was made conjointly with one wife and the second with another, had any bearing upon the question. The entire argument proceeded upon the assumption that the wives were non-entities, and the adoptions were made by the husband alone. The power of females to adopt and the character in which they do so, are matters that were necessary to be considered before a right conclusion could be arrived at in that case. I shall deal with them hereafter, but here I allude to them as they may have some connection with the usage of double adoption by men having two wives. We find many instances of such adoption in Bengal, which would be sufficient to establish their validity apart from law, if not also to raise a doubt that the law itself has been misapprehended. It is often the practice amongst men who adopt, that when they fail to get a son by their first wife, they espouse another under the belief that the first wife is barren, and in the hope that the second will present them with a son; and should this hope turn out to be false, they proceed to adopt. Now, they feel a great difficulty which might only be partially imagined by those unacquainted with the condition of a Hindu husband having two rival wives. His treatment of both the wives must be impartial at least externally, in order that he may live in peace. The Hindu religion requires a householder to perform religious duties, conjointly with his wife; and that rule applies with greater force to a religious ceremony for having a son. But the Hindu ritual does not contemplate the association of more wives than one, with the husband for performing any religious rite; and one wife alone appears to be entitled to have the rank of the indispensable associate of her husband for the purpose of a religious ceremony. If a son therefore be adopted by the husband conjointly with his senior wife, he becomes her son and a stepson to the junior one, and *vice versâ*.[1] This also affords a cogent reason why two sons should be adopted, one with each wife. The fiction of adoption, again, should imitate nature, but adoption of one son with two wives has no counterpart in nature. The course which appears to be just, proper and satisfactory to all parties, and which is accordingly followed in practice, is, that the husband either adopts two sons, one with each wife, or adopts a son with one wife, and permits the other to adopt another son, or authorizes each of them to affiliate a son. The danger to the first adopted son, which might be apprehended in case a man were permitted whimsically and capriciously to supersede or prejudice that
[illegible] by adopting another, and which underlies the modern development of law
[illegible] this point, is not sufficient to counterbalance the weighty considerations
[illegible]ling for an exception in such cases. The supposed injury to the first adopted
[illegible], also, is rather imaginary than real; for, when we practically find that,
[illegible] a general rule, rich men adopt poor men's sons who can scarcely have

[1] Kasheeshuree Debia *v.* Greesh Chunder Lahoree, W. R., Gap. No., p. 71.

substantial advantages or prospects in the family of their birth, and sustain very little loss by reason of adoption into a different family, it is more than sufficient compensation to the first adopted son even if he gets half the estate of his adoptive father.

It is, however, exceedingly difficult for a litigant to prove this usage to the satisfaction of a Court of justice;[1] because the practice of adoption itself being confined to a particular class, instances of the usage are to be collected from different districts, and it is almost impossible for a party to have the information about them and the means to prove them. But, the number of cases that come to the notice of experienced lawyers of the Bengal High Court may justify a fair presumption in favour of the existence of the usage, specially in a matter on which the law itself is doubtful.

**Simultaneous adoption a device to evade the ruling in Rungama's case.**—When a rule of law concerning matters of a civil nature prohibits a transaction sanctioned by usage and founded on motives and feelings which the law cannot effectively control, the persons affected by it endeavour to evade the rule, and lawyers apply their mind to devise means of doing the same. In this way, the Statutes of Mortmain gave rise to trusts in England,[2] and the usury laws in this country brought into existence the zur-i-peshgi leases.[3] The Privy Council decision in *Rungama* v. *Atchama* prohibiting a second adoption when the first adopted son is existing, was in fact a new rule of the same kind, and was felt as a grievance by sonless men having two wives, who were anxious to adopt two sons for giving them to each of his wives to bring up as her child; and with a view to evade the rule, Hindu lawyers hit upon the device of simultaneous adoption of two sons; for the adopter being destitute of male issue at the time of adoption, fulfilled the condition requisite for exercising the faculty of adoption, and as there was no restriction limiting the number of sons that could be adopted, it was thought that a dual adoption made in that way would be unexceptionable. Many adoptions are found in Bengal to have been made in that manner since the rule laid down by the Privy Council was adopted by the Sudder Court of this Province.

**Simultaneous adoption is held to be invalid.**—But with respect to the capacity for adoption, the principle adopted by our Courts is that it is a creature of law, and its extent must rest upon express authority of law. Accordingly as there is no express authority recognizing the duality or plurality of adoptions, excepting the passages praising the possession of many sons, one of which cited in *Rungama's* case was interpreted by the Privy Council to refer to begotten sons, simultaneous adoptions stand on the same foo-

[1] See Monemothonauth Dey *v.* Onouthanauth Dey, 2 Indian Jurist, N. S., 24.

[2] 2 Blackstone's Commentaries, 328.

[3] Dr. Rash Bihari Ghosh's Tagore Lectures, pp. 225—227.

ing with successive double adoption. Besides, if you take a common sense view of the matter, it would be most anomalous to hold that although a man cannot adopt two sons one after another, he is competent to do the same thing if he follows a different method. Such legal anomalies are not rare, but as the judges and the Hindus looked at the matter from different standpoints of view, the former could not sympathize with the device of simultaneous adoption, which has accordingly been held to be invalid.

In 1865 two cases[1] were decided by Justice Phear in the original side of the Calcutta High Court in which the question of the validity of simultaneous adoption, arose. The question is elaborately discussed in the first case, in which some evidence of usage was given which could not be satisfactory, and several learned Pandits were examined to explain to the Court the real meaning of the passages of the Dattaka-Mímánsá and the Dattaka-Chandriká, bearing upon the capacity of a man to adopt more sons than one. They said to the Court what I have already told you, namely, that there is nothing in those treatises prohibiting plurality of adoptions, and that the word "sonless" in the text of Atri, means one destitute of a son of the body, and it is understood in that sense by those commentaries. But the Court could not accept and act upon that interpretation which was opposed to the view of law taken by the Privy Council in *Rungama's* case, and followed by the superior Courts here. It is a matter of regret that if any decision of the Judicial Committee on a question of Hindu law be really based upon a misconception on account of the materials placed before it being imperfect, it becomes almost impossible to get it rectified. All cases do not go up to the Privy Council, and the ruling is followed by the Judicial Courts, as neither the judges nor the lawyers, who have no access to the original treatises, can perceive any defect, until some time after the misconception is sought to be brought to the notice of the Court in a few cases in which large interests are at stake, and the parties happen to be properly advised, when it is considered too late to go behind the decisions. In the first of the above cases, Justice Phear, after having concluded his discussion of the authorities, by referring to the previous decisions on double adoption, expresses his views in the following passage (p. 43) :—

"With these authorities before me, can I entertain any substantial doubt as to the legitimateness of the conclusion to which an independent consideration of the Sasters and the digests had led me? I feel myself bound to hold that in Bengal while one adopted son is living, a second cannot be adopted. I am also further of opinion that the power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not

[1] Monemothonath Dey *v.* Ononthnauth Dey, 2 Indian Jurist, N. S., 24; and Siddessory Dasee *v.* Doorgachurn Sett, *Idem*, 22.

extend to enabling him to do more than is, at the time of exercising it, reasonably sufficient to satisfy the purpose for which the law gave it. Consequently supposing the occasion for exercising the power to have arisen, one son and one alone can be adopted. An attempt to adopt more than one son at a time must be an abortive act, and void for all purposes unless perhaps so far as it may entitle the unlucky boys to maintenance, a question with which I need not now burden myself. It is suggested that at least one son may be adopted for each wife which the adoptive father may have, but this argument is founded on a false analogy. The existence of a wife does not form an element in the question; and it seems to be indisputable that one who has no wife whether because he has never married, or because his wife has died, is as much entitled to adopt as one who had a wife (and see Dattaka-Mímánsá, sec. ii, p. 45 and Jagannatha). It was stated by the defendant's Counsel that the usage and custom of Bengal gives a childless man the right to adopt one son in respect of each of his wives either simultaneously or not; but as I have already said no such evidence as the Court considered admissible to establish a custom or usage was tendered during the trial."

Referring to the above passage, the Calcutta High Court[1] made the following observations in the next case in which the same question arose:—

"The words 'reasonably sufficient' might be taken to mean what a reasonable man might think sufficient to ensure his happiness in a future world, but the context shows that the learned judge merely meant that the exercise of the power of adoption must be limited by the necessity of the case.

"Applying that rule, it follows that, as the adoption of one son alone is actually necessary, and is in itself wholly sufficient to satisfy the purpose of the law, the adoption of two is not within the scope of the power; and that where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time."

This case went up to the Privy Council, and their Lordships confirmed the view taken by the High Court; the following passages of the judgment bear upon the question of simultaneous adoption[2]:—

"But then there is the other question whether, if the authority did allow them to adopt in this manner, it would be done lawfully according to Hindu law. It had been clearly settled by this Committee in the case of *Rungama* v. *Atchama*, that a man having an adopted son could not, during the life of that adopted son, adopt a second son. The authorities are fully go e

[1] White and Macpherson, JJ., in Gyanendrachunder Lahiri v. Kala Pahar Hajee, I. L. R., 9 Cal., 50, (52).

[2] Akhoychunder Bagchi v. Kalapahar Haji, I. L. R., 12 Cal., 406, (412).

into; and although there appeared to be a conflict of opinion among the Pundits upon the subject, that was decided by the Committee. That case, no doubt, is distinguishable from the present. A simultaneous adoption in some respects would differ from the adoption of a son when there was already one son in existence, and the reason given for not allowing such an adoption is, that there are different texts which seem to direct that that power of adoption is only to be exercised where the person adopting has not a son either natural born or adopted. But much of the reasoning upon which that case was decided applies to the case of a simultaneous adoption. The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu law, is that no authority and no text has been, or apparently can be produced showing that the Hindu law allows it. It is true that the texts with regard to adoptions are but few, but still they are sufficient to lead to the conclusion, that if it was intended that such a power as this should be given to a man with regard to adoption, there would be something in the different authorities in favour of it. That it was not intended by Hindu law may be inferred from the provisions which are made for the case of a son being born after a man has made an adoption. It is laid down by Macnaghten that if a son is born after a son has been adopted, the property is to be divided between the adopted son and the natnral born son in certain proportions, giving, in the case of there being only one adopted son and one natural born son, to the adopted son a third, according to the law of Bengal, and a fourth according to the doctrines of other schools. Then he goes on to speak of the cases where there are more than one natural born son, and states the law for the distribution of the property in such cases. But no reference is made in any of the cases to there being more than one adopted son; and as the power of a Hindu either to adopt himself, or to give to his widows the power to do so in his place, depends upon the law, it seems to their Lordships that it is incumbent upon the party who seeks to avail himself of a simultaneous adoption to produce some authority to that effect. The entire absence of any authority in favour of such an adoption is an argument that the Hindu law did not recognize it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some authorities would have been found on the subject."

In all these cases the decision turned upon a different point, and therefore it may be said that the point has not been finally settled. But it is impossible t expect that any Court will come to a different conclusion upon the question, i spite of the views expressed in those cases. Accordingly, the High Court o Calcutta have adopted that view of the law, and held that simultaneous a ptions are not valid, and so the question has been judicially determined.[1]

[1] Doorga Sundari Dassee *v.* Surendra Kisav Rai, I. L. R., 12 Cal., 686.

The process of reasoning by which the above conclusion has been arrived at, are these: there is no express text authorizing a man to adopt two sons either simultaneously or successively, so that he may have two sons at the same time; the power therefore must be limited by spiritual necessity, for which the law confers it; and as that necessity is satisfied by having one son, a man can adopt one son alone, at a time. The possession by a man of more wives than one makes no difference, because a man that has not married can adopt, and because the wives may adopt only as agents under delegated authority from the husband. This last point appears to have been assumed without any discussion.

**Distinction between simultaneous and successive adoptions.**—There is one important respect in which a simultaneous, differs from a successive adoption of two sons: in the former both the adoptions are invalid, but in the latter the second only is so, the first being valid. Hence it is important to consider what constitutes two adoptions simultaneous as distinguished from successive, for it may be keenly contested that two adoptions were not simultaneous, so that the one earlier in point of time could be valid. With respect to this point, Justice Phear observes:[1]—"But, moreover, on that occasion, the ceremonies for the two boys were carried on, practically speaking, simultaneously, although possibly the beginnings and endings were not absolutely synchronous. If either boy was adopted, both were adopted, and it would be an outrage to common sense to say otherwise than that they were adopted at one and the same time." For many legal purposes a part of a day is not, doubtless, taken into consideration. But the Hindu usages appear to recognize even the difference of a few seconds between the time of birth of children for some important purposes. The rank among brothers is determined by the order of birth; and of twin brothers the first-born is considered as the elder, and is entitled to all the rights of the eldest son, should he be so, as regards inheritance, and of an elder son as regards marriage, performance of religious ceremony, and so forth; for an younger brother cannot contract a marriage when an elder brother is unmarried, nor can he perform the religious ceremony of offering oblations when there is an elder brother; and a brother who is older by a few moments, is entitled to take by primogeniture, and also to specific deductions for seniority. Hence it may very fairly be contended from this analogy that an adoption being alike to the birth of a son, why should not one whose adoption ceremony is completed a few moments earlier, be entitled to claim seniority and priority in relation to another whose adoption is completed later though on the same day, and the adoptions be declared successive instead of simultaneous.

**On the death of the first adopted son without male issue a second adoption is permitted.**—The decisions referred to above prohibit an adoption

[1] Siddessory Dassee *v.* Doorgachurn Sett, 2 Indian Jurist, N. S., 22.

only when a son begotten or adopted, is alive. But a man is at perfect liberty to make a second adoption on the death of the first adopted son without issue in the same way as a man whose natural born son has died, may adopt a son.[1] All that has been laid down is, that a man is incompetent to adopt for the purpose of having two sons at the same time; otherwise he may without any restriction go on adopting sons, one after another, provided he be destitute of son at the time of adopting any one of them. The following observation of a the Privy Council may seem to lay down a restriction applicable to an adoption made by a widow after the death of the husband who had a son existing at the time of his death, and permitted her to adopt in case of the son's death[2]:—"In this case, Bhowanee Kishore (the existing son) had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father." But this was merely a passing remark and had no appreciable effect on the decision which rested on a different principle. For the religious obligation to adopt is founded upon the duty of having a son for the purpose of discharging the spiritual debt to one's ancestors, by continuing their lineage; and a man's grandson and great-grandson in the male line are declared competent to confer special spiritual benefit upon him.[3] Therefore a son dying without leaving male issue cannot be said to have exhausted the whole of the spiritual benefit which a son was capable of conferring on his deceased father.[4]

Similarly if the first adoption be invalid a second adoption may be made; for the first adoption being illegal, the adopter remains sonless notwithstanding the same, and is therefore competent to adopt another son.

**The subsequent death of the son first adopted does not render the second adoption made in his lifetime a valid one.**—It has been so held[5] upon the ground that a second adoption made during the life of the son first adopted who retains his character of sonship, is absolutely void, it was in fact no adoption at all; and therefore the death of the first adopted son, subsequent to the second adoption, cannot invest the subject of it with the character of sonship.

**Is second adoption made when a son is existing, absolutely void?**—But according to the view of adoption, taken by the Sanskrit commentators, it consists of two parts, namely, the transfer of paternal property in a son, and

[1] Dattaka-Mímánsá, 1, 4.

[2] *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharj*, 10 Moore's I. A., p. 279; 3 W. R., P. C., 15; Pundit's P. C. J., Vol. II, p. 111.

[3] Manu, ix, 137; Yájnavalkya, i, 78.

[4] Ram Soonder Singh v. Surbanee Dassee, 22 W. R., 121.

[5] *Basoo Camumah* v. *Basoo Chinna Venkatasa*, Madras, S. D. A. R., 1856, p. 20; *Veraprashyia Santanraja*, *Idem*, 1860, p. 168.

his investment with all the rights of sonship. When the donor is competent to give, the gift and acceptance of a son will pass the paternal property to the adopter, so as to sever his connection with his natural relations, and to constitute him a son to the adopter. But a son as such, according to Hindu law, is not clothed with the legal status of sonship, which means right of inheriting the estate, and competency to confer spiritual benefits. A son congenitally blind is also a son, although he does not possess the legal character of sonship, so as to be entitled to a share of the estate. So also a son of a Bráhmana by a Sudrá wife, is a son, though in respect of inheritance he is no better than a disqualified son. A second adopted son is a son of the same kind, and as such, is entitled to maintenance. The correct view seems to be that such adoptions are not absolutely void, but create an imperfect sonship, which may be allowed to ripen into a perfect one when the obstacle is removed, and there is no other impediment.

**Effect of pregnancy of the adopter's wife at the time of adoption.**—The Madras Sudder Court held that the adoption of a son, made by a person when his wife was pregnant is invalid, upon the ground that a person should be hopeless of having a son of the body before he could exercise the right of adoption.[1] This view was based upon a misconception of the meaning of a certain passage of Saunaka,[2] namely, "having fasted for a son", which really means, as explained in the Dattaka-Chandrika,[3] "having observed a fast on the day preceding the adoption,"[3] but which taken by itself, might support the view that an adoption would be valid only if made by a person hopeless of having male issue, if it were interpreted as meaning that the man desirous to adopt must have previously sought the natural accomplishment of his desire by means of religious rites. But the Madras High Court dissented from this view in a case[4] in which a man *in extremis* adopted a son with the knowledge of the pregnancy of his wife who subsequently brought forth a daughter, and held that the adoption was a valid one. There is not only no authority for the broad proposition laid down by the Sudder Court, but it is opposed to the provision made by Hindu law for the mode of distribution of the adopter's estate between an adopted son, and a son that may, subsequently to adoption, be born to him.

**Does the existence of a male child in embryo invalidate an adoption, if it comes into separate existence after adoption?**—But the real question of some nicety, that arises for discussion in this connection, is, now that an adoption has been pronounced invalid if made by a man having male issue,

[1] Narayana Reddi *v.* Vardachala Reddi, Madras, S. D. A. R., 1869, p. 97.
[2] Dattaka-Chandrika, 2, 1.
[3] Idem, 2, 2.
[4] Nagabhushanam *v.* Seshamma Garu, I. L. R., 3 Mad., 180.

whether this restriction applies to a case where the adopter has an unknown son in the womb of his wife at the time of adoption, who subsequently to it comes into separate existence? Can it be said that his father was "sonless," so as to entitle him lawfully to adopt a son? The question is beset with some difficulty.

A child *in embryo* is, in contemplation of Hindu law, entitled to certain rights, to the same extent as a child *in esse*, provided it be born alive; and its rights are not contingent on the knowledge or ignorance, on the part of those whose interests are affected, of the fact of the pregnancy. Thus it is laid down in the Mítákshará that when the pregnancy of a female member of a joint family, who may give birth to a child entitled to a share, is known, partition of the joint family estate must be postponed until delivery; and if the pregnancy be not known at the time of partition, and a son is afterwards born, he is entitled to a share by re-opening the partition already made.[1] So also a nearer heir who is conceived at the time of the death of the proprietor, when succession to his estate opens, is entitled on his birth to take the estate by divesting the next heir who took the estate on the owner's death. Again, a child in the womb has been held to be a fit object of gift. In the leading case of *Tagore* v. *Tagore*[2] the Lords of the Judicial Committee while dealing with the Hindu law of gifts *inter vivos* and by wills, and the extent of the donor's power with respect to the person on whom a gift can be bestowed, observe,—"It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dáyabhága, ch. 1, v. 21 by the phrase 'relinquishment in favour of the donee who is a sentient person'. By a rule now generally adopted in jurisprudence, this class would include children *in embryo*, who afterwards come into separate existence."

In the last instance it is clear that the child must be born alive in order to be entitled to the gift. But the commentators on Hindu law do not express themselves clearly on this point. The author of the Dáyabhága, however, appears to intimate conception and not birth of a son to be the mediate cause of inheritance, in the passage:—"In some works it is alleged that birth, (*janma*) alone is the cause of right: but there, by the mention of birth, the relation of father and son, and the demise of the father are mediately indicated as causes of property."[3] Achyuta and Srikrishna two of the commentators of the Dáyabhága, while explaning that passage say that the text of Gotama declaring right by birth (*janma*) applies to a son *in embryo* whose father dies.[4] For many purposes such as *Upanayana* and marriage, the age of a person is computed from the time of conception.

In all these cases, the principle must be either of the two, namely, that the

[1] Mítákshará, 1, 6, 8—11. [2] 18 W. R., 359. [3] Dáyabhága, 1, 20.

[4] See Pandit Bharatchundra Siromani's Edition of the original Dáyabhága with six commentaries, pp. 26 and 27.

subsequent birth relates back to the time when the partition is made or the succession opens or the gift speaks; or that the property vests in the child *in embryo*, so that even a still-born child may become entitled in the same way as one born alive. But the latter is inconsistent with the view now generally adopted in jurisprudence, and has not been adopted by our courts to be the rule of Hindu law. Accordingly it has been held that proprietory right is created by birth, and not by conception; a child in the womb takes no estate; in cases where, when the succession opens out, a female member has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained; if the child be still-born, the estate does not go to his heir, but to the heir of the last full owner: so also a son's or grandson's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favour of an unborn son or grandson.[1]

Leaving aside the case of a still-born child, let us confine our attention to an adoption during the pregnancy of the adopter's wife when a son is subsequently born alive. If his birth relates back to the date of his conception for the purpose of unmaking a partition made after conception, of causing abeyance of an inheritance, or of entitling him to take a gift already opened, it is difficult to understand why should it not also invalidate an alienation testamentary or *inter vivos* as well as an adoption? If an adoption may be, as it often is, set aside years after the fact, there is no hardship to do the same when it transpires within two hundred and eighty days of the transaction that it was done in ignorance of the existence of a son.

In ordinary circumstances, a man anxious to have a son would naturally be disposed to wait till delivery when he is aware that his wife is *enciente*, before adopting a son. But such a person when *in extremis*, may himself adopt a son instead of permitting, as he might have done, his pregnant wife to do it in the event of his death, and of her giving birth to a daughter, fearing that she may not carry out his direction to adopt, which is detrimental to her own interests as well as to those of the female child that may be born of her. The question therefore may arise in such cases, as also when the pregnancy of the wife is not manifest or known at the time of adoption.

**Question answered in negative.**—The question arose in a case[2] before the Bombay High Court, in which a man had three or four days before his death adopted a son, and as his wife was then pregnant, directed by his will that, in the event of a son being born to him after his death, his property should be equally divided between such son and the one adopted; and a s was subsequently delivered by his widow. It was decided that the adopti was good, but the testamentary disposition reducing the begotten son's leg

[1] *Musst. Goura Chowdhrain* v. *Chummun Chowdry*, Gap number, W. R., 340.

[2] Hanmant Rámchandra *v.* Bhimáchárya, I. L. R., 12 Bom., 105.

share was invalid. The reasons for the validity of such an adoption, and the rights of a posthumous son are explained in the following portion of the judgment delivered by Sargent, C. J. :—

"It may doubtless be contended that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son. A man in bad health or on his deathbed, as in the present case, might not live till the child was born; and yet, if the rule be as contended for the appellant, the suspension must *ipso facto* take place in all cases during pregnancy: for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy.

"The rights of a child in the womb are doubtless much regarded by the law, as in the case of inheritance and partition; but, as pointed out by the Madras Court, if the doctrine of suspension of the power of adoption during pregnancy 'be carried to its legitimate conclusions, and the validity of the exercise of the power be made to depend on an event which may not be known, it follows that an element of uncertainty is introduced into an act regarded as highly religious.' In Steele's Hindu Customs, it is said that the duty to adopt does not arise until the birth of a son becomes very improbable, by which, we think, must be meant, having regard to the religious importance attaching to the act when there is considerable risk of the adopter dying sonless, which is certainly the case when a man is on his deathbed although his wife may be actually pregnant at the time. We think, therefore, that the Subordinate Judge was right in holding that the defendant's adoption was a valid one.

"Independently of the question as to the effect of Rámchandra's will, the defendant would, by general Hindu law, have been entitled to only one-fourth of his adoptive father's estate on the birth of the minor plaintiff. By that will the estate was divided equally between the two sons, and it is contended for the defendant that Rámchandra was competent to make this provision by will, because there was no natural son in actual existence at the time of his death. It is doubtless true that it is by actual birth the son acquires, according to the Mítákshará law, a right of co-proprietorship with the father in the ancestral property. But a posthumous son has certain rights by the Hindu law which it is necessary to consider. A child, who is in its mother's womb at the time of its father's death, is, for the purposes of inheritance, deemed to be *in esse;* and, as regards partition, a child, if begotten at the time, is, as pointed out by Sir Barnes Peacock in *Kallidás Dás* v. *Krishanchandra*

*Dás*,[1] in point of law, in existence at the time of partition, and entitled to share with the other sons or brothers. So far, therefore, a posthumous son has equal rights with a son actually born.

"But the present case raises the more difficult question, and which, as far as we can discover, is clear of authority, as to whether his right by survivorship is identical with that of a son *in esse* when in conflict with a testamentary provision by his father. * * * It is to be remarked that this is a distinct question from the father's power of alienation during his life as against a son who was only begotten at the time, which is the case in *Musst. Goura Chowdhrain* v. *Chummun Chowdry* referred to by the Subordinate Judge. The right of the posthumous son by survivorship, on the principle of relation back to the time of the father's death, which obtains in the analogous cases of inheritance and partition, would stand on the same footing as that of the son *in esse* at the time of the father's death, and a due regard to the harmony of the law under analogous circumstances justifies, we think, the conclusion that a father can no more interfere by his will with the right of a posthumous son to his share in his family property as fixed by law, than in the case of a son *in esse* at the time of his death, and if this be so between the posthumous and other natural born sons, it must also obtain between the posthumous son and an adopted son who stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born."

**Adoption by the father of a missing son.**—A somewhat vexed question may arise as to the validity of an adoption made by a person having a son who disappears and is not heard of. As to the rule of Hindu law relating to presumption of death in regard to missing persons, the authorities vary according to those persons' age and relationship;[2] twelve years, however, is the shortest period after which a person is presumed dead, when his effigy is to be burnt and exequial rites performed. Raghunandana whose authority is respected in Bengal, adopts the shortest period of twelve years, on the expiry of which death is to be presumed; and his authority has been accepted in Bengal.[3] The above provisions seem to lay down the rule that the commencement of the thirteenth year is to be taken the exact time of the missing person's death. It appears to be doubtful whether these rules are to be regarded as part of the substantive law of inheritance, or as mere rules of evidence and as such now replaced by the provisions of sections 107 and 108 of the Evidence Act.[4] But

[1] 2 Beng., L. R., 103, F. B.

[2] Strange's Hindu Law; W. Macnaghten's Hindu Law, Vyavastha Darpana, pp. 11 and 3 (2nd Edition).

[3] *Janmajoy Mazumdar* v. *Keshablal Ghose*, 2 B. L. R., A. C., 134; *Gurudas Nag* v. *Mati Nag*, Ibid, Ap. 16.

[4] *Parmeshar Rai* v. *Bisheshur Singh*, I. L. R., 1 All., 53; *Dhampath* v. *Gobind Ser*, Ibid, 8 All., 614.

whatever may be the view taken on this point, the questions that may arise relating to adoptions in such cases are, first whether an adoption made before the expiry of seven or twelve years is valid, and secondly, whether an adoption made after seven or twelve years is lawful if the missing son subsequently reappears. In the first case the answer depends upon the solution of another question, namely, as to the exact time of the missing son's death. The second case, however, is beset with considerable difficulty.

I may observe here that in cases of doubt and difficulty like the present, the best course to follow would be to declare the adoptions valid, regard being had to the fact that this view is consistent with the true construction of Hindu law with respect to a man's power of adoption.

**Adoption by a man having a son who becomes an ascetic, Sannyási or Fakir.**—I have already told you that for the purpose of indicating the different duties a man at different ages has to discharge, his life is divided into four stages; in which he is respectively called a *Bráhmachárí* or student, *Grihastha* or householder, *Vánaprastha* or hermit or one gone to retirement, and *Bhikshu* or ascetic. I have also explained to you that although this scheme of life, was originally designed for the twice-born classes, and especially for the Bráhmanas, it has been extended to even the Súdras, and at the same time it has ceased to be obligatory on the Bráhmanas. Entrance to the third and the fourth orders is equivalent to civil death: and his estate becomes divisible by his heirs in the same way as if he were really dead.[1] Although the ancient system of society has completely changed, yet there have sprung up religious orders, of which some are founded upon the same basis and may be regarded as continuations of the ancient religious orders. The effect of a person's entrance into a religious order is to cut off his connection with all his relations as regards both civil and religious matters.

That being so, a person, whose son renounces the world and enters into a religious order, is in the eye of Hindu law destitute of male issue, for such a son serves neither the temporal nor the spiritual object, and is in no way better than a disqualified son in these respects. It follows therefore that a person having a son who has become a *Sannyasi*, ascetic or *fakir* may legally adopt a son; and it has been held[2] that an adoption by a man whose real legitimate son is a *fakir* is valid.

It is worthy of remark in this connection that the Hindu law does not permit a man who has once adopted a religious order to renounce it, so as to be readmitted into his original status in the family; and it is ordained that an apostate om a religious order is unworthy of inheritance.[3] In fact, according to Hindu w, a Bhikshu or ascetic adopting the fourth order cannot hold any property at

[1] Dáyabhága, 1, 31 and 33. [2] Punjab Records, 1875, p. 144. [3] Dáyabhága, 5, 14.

all;[1] while a Vánaprastha (gone to retirement in a forest) or hermit who may have and hold such property as is absolutely necessary for life, is directed to give away in the month of Ásvin each year, anything in his possession, over and above what is indispensably necessary, that he may have procured during the year.[2] But whether the *lex loci* Act, XXI of 1850, removes their disability under the Hindu law, should they prefer a claim based upon inheritance, is a question which has not as yet arisen. The so-called modern Byragees, however, must not be confounded with persons adopting religious orders, for they do not quit the order of the householder.[3]

**Adoption by one having a disqualified son.**—According to Hindu law a person bearing filial relationship does not necessarily fill the character of a son. Having premised sons chief and secondary, Yajnavalkya[4] explains in the following passage the order of their succession to the heritage:—"Among these, the next in order is the heir, and presents funeral oblations on failure of the preceding." And Nanda Pandita, referring to this passage, says,[5]—"It declares that the capacity to present oblations and to participate in heritage constitutes sonship; for, if that be wanting, the mere existence of filial relationship, as of an impotent or the like disqualified son, does not constitute it." The disqualified sons can neither render spiritual service nor inherit the estate, in fact, they do not possess the legal character of a son. A man having such a son therefore is deemed in contemplation of law to be "sonless" for the purpose of adoption. The existence of a disqualified son is no bar to an adoption made by the father, Sir T. Strange observes,—"The right of inheriting, and that of performing for the ancestor his funeral obsequies being correlative, if, by any of the legal disabilities, as by degradation from caste, by insanity, incurable disease, or otherwise, living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches."[6]

The disqualifications incapacitating persons to offer funeral oblations and excluding them from inheritance, are certain physical, mental and moral deformities. Of the physical defects some are congenital, such as blindness, deafness, dumbness, impotency, lameness and so forth; and some not so, as leprosy of the sanious and ulcerous kind, and certain incurable diseases. The mental defects are idiotcy and insanity. The moral defects consist of habitual enmity to the father, commission of heinous sin causing degradation, and misconduct meriting excommunication.

[1] See Manu, Ch. VI. [2] Manu, 6, 15.
[3] *Teeluk Chunder* v. *Shama Charn Prokash*, 1 W. R., 209.
[4] Yájnavalkya, 2, 133; Mit., 1, 11, 21.
[5] Dattaka-Mímánsá, 2, 62.
[6] Strange's, Hindu Law, Vol. I, p. 77.

Renunciation of the Hindu religion and conversion to Christianity or Mahomedanism, used to cause excommunication and exclusion from inheritance. That change of religion should be attended with loss of civil rights is a rule that appears to be unreasonable; and the enormity of all the offences that cause degradation is not appreciated in these days, since drinking spirituous liquors is set forth in the Shasters as one of the worst sins. Accordingly the *lex loci* Act XXI of 1850 was passed to remove the disabilities imposed by Hindu law, on persons guilty of conduct followed by degradation or loss of caste.

**Adoption by a person having a son who becomes a Christian or Mahomedan or degraded.**—The *lex loci* Act has by declaring that the renunciation or exclusion from the communion of any religion, or deprivation of caste shall not impair or affect any right of inheritance, preserved to Hindu outcasts and apostates from the Hindu religion, the right of inheritance, from which they were previously excluded by Hindu law and usage. This law simply confers upon these persons the capacity to take the heritage of their father, or other relation; but their incapacity to perform the religious rites conducive to the spiritual benefit, remains unaffected by this legislation. You will bear in mind that the character of sonship consists in the capacity to take the heritage and the capacity to present funeral oblations, the two together constitute the status of a son; apostates and outcasts who do not possess the latter capacity, cannot, therefore fill the full character of a son according to Hindu law. A man having a son of that description cannot but be regarded as "sonless" in the contemplation of Hindu law. It would therefore appear that the existence of such a son does not debar the father from adopting a son.

It may doubtless be said that the father cannot be permitted to adopt a son, inasmuch as the validity of the adoption would be inconsistent with the act abrogating any law or usage which may in any way impair or affect the right of inheritance of an existing son of the kind mentioned above. But if you construe the Act in that way, it might as well be said that the Act makes it illegal for the father to beget a son, or make a testamentary disposition of his property, after a son of his becomes an outcast or renounces the Hindu religion; because that also impairs his right of inheritance. Therefore the adoption, any more than the procreation, of a son, was never intended to be prohibited by that Act. Besides, religious toleration is the principle underlying the provisions of the Act; it is therefore not quite reasonable to think that while it confers religious freedom upon the son, it does at the same time deprive the father of his religious freedom of acting according to the dictates of the shasters which require that he must have a son competent to perform the religious rites beneficial to his soul.

**Adoption by one having a grandson or great-grandson in the male line.**—According to Hindu law a grandson and a great-grandson in the male

line occupy the same position as a son for many purposes, and the term '*aputtra* or sonless' in passages relating to inheritance, has been interpreted to mean, 'destitute of male issue down to the great-grandson.'[1] While explaining the text of Atri on adoption, Nanda Pandita observes that the word son in the compound term "*aputtra* or sonless," is inclusive also of the son's son and grandson, for they also confer the spiritual benefits for securing which a son is necessary.[2] Therefore the existence of a grandson or a great-grandson in the male line affects the capacity to adopt in the same manner as the existence of a son. Hence whatever has already been said with respect to the effect on adoption, of the existence of a son applies *mutatis mutandis* to the existence of a grandson or greatgrandson in the male line.

But it should be noticed here that there are texts of the rishis, showing that different kinds of spiritual benefit are derived from the three male descendants respectively; and I have already told you that Nanda Pandita being pressed by an argument based upon that ground, concedes that a man having a son, may adopt a grandson and a great-grandson for securing the special spiritual benefits that are derived from them respectively.[3] And it would similarly follow conversely that a man having a grandson in existence may adopt a son. But in either case it is a spiritual luxury which he will not be permitted to secure.

There may be some hardship, however, when there is a competition between persons of different degrees for adoption, as it has now been held that a descendant by adoption holds in all respects the same position as the real male issue of the same degree. Suppose a man had a son who died giving permission to his widow to adopt, the man is anxious to adopt a son, himself, but he could not procure a suitable boy for adoption, and his son's widow forestalls him by adopting one against his will. According to the view of law, taken at present, the man becomes deprived of his power of adoption by the action of his son's widow; but he can, if governed by the Bengal school, give away his whole property to a perfect stranger, and so exclude his grandson by adoption from any share of his property, and if governed by the Mitákshará, dispose of his whole separate property in that way and manage to deal with half the ancestral property in the same manner.

But there is no difficulty if the adoption is made by the son's widow with the knowledge and consent of the father, as in the case of *Ramkishen Surkheyl* v. *Mussummaut Sri Mutee Debia.*[4]

**Existence of a fraternal nephew or daughter's son is no bar to adoption of another.**—Manu declares: "If amongst uterine brothers one

[1] See Yájnavalkya, ii, 136-137; Vishnu, xvii, 4—13 and 31; Dáyabhága xi, 4—5; Vimitradayá, iii, i, 1 and 11.

[2] Dattaka-Mímánsá, 1, 39.

[3] Dattaka-Mímánsá, 1, 3 and 13.

[4] 3 Bengal Select Reports, 489, (New Editio

come father of a son; Manu ordained that all the rest become fathers of male issue by that son."[1] And from this it may be argued that a fraternal nephew, occupies the position of a son without adoption. This position is controverted, and the conclusion arrived at is that he cannot become son of his uncle unless regularly adopted, and the passage intends that when he is available for affiliation no other should be adopted.[2] At one time, it was held that when a brother's son eligible for adoption exists, the affiliation of any other is invalid.[3] But it is now settled by the Privy Council that passages in the Dattaka-Mímánsá and the the Dattaka-Chandriká, which prescribe that a Hindu wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious Hindus as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.[4]

There are passages declaring that a daughter's son is equal to a son's son, as regards capacity to confer spiritual benefits; but they do not appear to have been conceived to affect the maternal grandfather's capacity to adopt notwithstanding the existence of a daughter's son.

**Adoption by a bachelor or a widower.**—On a careful consideration of the duties of man in the successive stages of life, as prescribed by the institutes of the rishis, there cannot be any doubt that it is the primary religious duty of a man to espouse a wife for the purpose of having a son of the body. But if a married man be destitute of male issue, then he may have a secondary son as a substitute, for securing the services both temporal and spiritual, that a son of the body might render. Strictly speaking, an affiliation of a son cannot be made by an unmarried man, from a sense of religious duty. Hindu law again enjoins every man to live in one or other of the four Ásramas or orders of life; a widower who feels no inclination for entering into a religious order, must therefore marry again to continue as a householder, if he be really religiously disposed and anxious to act according to the dictates of the Shasters. Hindu law disapproves single life for a man living in the community of householders. But as the entrance into the third and the fourth order of life has fallen into disuse, an adoption by a widower who is hopeless of getting a son by re-marriage, may not be open to exception on religious ground, although he is not strictly a householder on whom the duty of having a son is imposed. Judged, however, by the religious principles enunciated by the Codes, an adoption by a widower is not

[1] Manu, 9, 182; Dattaka-Mímánsá, 2, 29.

[2] Mitákshará, 1, 11, 36; Dattaka-Mímánshá, 2, 74; Dattaka-Chandrika, 1, 20.

[3] Ooman Dut *v.* Kunhia Sing, 3, Bengal Select Reports, 192, (New Edition).

[4] Wooma Dasee *v.* Gocoolanund Dass, L. R., 5 I. A., 40; I. L. R., 3 Cal., 587; 2 C. L. 51; affirming the decision of the Bengal High Court, 23 W. R., 340.

free from objection. Accordingly Somanátha in his Datta-Mímánsá[1] maintains that a widower cannot adopt.

But if the secular aspect of adoption be considered, there cannot be an objection to the affiliation by a bachelor or a widower. Adoption consists in the transfer of parental property in the son, and any one capable of accepting property is also competent to adopt. This principle is recognized by the Sanskrit commentators, and is put forward by Jagannáth in support of several propositions mantained by him. Accordingly Jagannátha says,—"It should be here remarked, that no law is found expressing that a son shall not be adopted by one who has not contracted a marriage."[2] The Pauránik story of the demigods Betála and Bhairaba, cited by Nanda Pandita[3] appears to support the same view; although he explains the term "sonless" in Atri's text to mean "one to whom no son has been born or whose son has died,"[4] and thereby intimates that the adopter must be a married man.

Departing, however, from the general principle laid down in several cases, namely, that capacity to adopt must rest upon express authority, it has been held that as there is no authority against it, an adoption by a widower[5] as well as by a bachelor[6] is valid according to Hindu law.

One great difficult question, however, presents itself in these cases, namely, as to who will be the maternal grandsires of the boy adopted by a bachelor or a widower, for temporal as well as for spiritual purposes? According to the ritual of Párvana Sráddha, a man has to offer three oblations to his three paternal ancestors, and three to his three maternal grandsires. Jagannátha makes a somewhat wild suggestion in the case of an adoption by a bachelor, namely, that the adoptive father's maternal ancestors are to be deemed the adopted son's maternal grandsires for the purpose of that ceremony. When the adopter is a widower it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son. I may tell you in this connection that in the case of a regular adoption by a man and his wife, the adoptive mother's ancestors are considered by Nanda Pandita to become the adopted son's maternal grandsires for the purpose of the Párvana or the offering of double set of three oblations.[7]

**Adoption by persons belonging to the religious orders does not appear to be contemplated by the Hindu legislators.**—According to the Codes there are three descriptions of religious order or rather three ways in

[1] Strange's Manual of Hindu Law, Section 61.
[2] Dig., V, 273.
[3] Dattaka-Mímánsá, 2, 45.
[4] *Idem*, 1, 3-4.
[5] Nágappa Udapa *v.* Subba Sástry, 2 Mad. H. C. Rep, 367; N. Chandvasekharudu *v.* N. Bráhmanna, 4 Mad. H. C. R., 270.
[6] Gopal Anant *v.* Náráyan Ganesh, I. L. R., 12 Bom., 329.
[7] Dattaka-Mímánsá, 6, 50.

which a person may renounce the world for the sake of religion. The first is the *Naishthika Brahmachárí* or the lifelong student of theology, as distinguished from the *Upakurvána Brahmachárí* or the ordinary student, who after having finished his course of study commenced from his Upanayana ceremony, comes back to his family and becomes a householder. But a student so devoted to the study of theology as to feel no concern for worldly matters nor inclination for marriage, and to take a vow of celibacy, is called *naishthika* or professed student who cuts off his connection with his family and lives with his Guru or spiritual preceptor. The second, is the *Vánaprastha* or householder ritiring in his old age to a forest or a solitary place, when his temporal affections become extinct, and he relinquishes his property to his sons or other heirs, severs his connection with them, and associates with persons of the same disposition and order with himself. The third is the *Yati* or *Bhikshu* or ascetic who is either a *Vánaprastha* practising rigid austerities, or a young householder of a religious turn of mind leaving the world in disgust and becoming at once an ascetic or a religious mendicant. His religious aim is the attainment of *moksha* or liberation from the necessity of transmigration of souls. So thoroughly disconnected these persons are from their family and natural relations, will appear from the law relating to the devolution of the small property that they may leave behind after their death: the property of a *Brahmchárí* goes to his preceptor, of a *Vánaprastha* to his religious brother, and of a *Yati* to his virtuous pupil.[1]

Thus it appears that persons entering into religious orders, as such, cannot have any son, real or secondary. The Víramitrodaya[2] says that a person who is desirous of having *moksha* or liberation from the necessity of repeated deaths and births, cannot give his wife authority to adopt; the reason being that he need not have a son at all. The virtuous pupils of *Yatis* or ancient ascetics resemble the *chelas* or disciples of the modern *Mohants*, who occupy the place of sons for worldly purposes. Adoption of a son by the *Yatis* or *Mohants* is not necessary either for temporal or for spiritual purposes. Accordingly it has been held that an ascetic cannot adopt.[3]

Various systems of religious doctrine, however, have arisen since the promulgation of the Codes, and with them different religious orders have come into existence, which though not the same as the ancient ones are to a great extent moulded upon the same principle, and bear the same character. And in the present connection they should be regarded the same as the old institutions, although they may bear different names. Thus "Vibhut Vidá" is a ceremony indicating renunciation of worldly affairs and interests analogous to 'retirement to a forest' in ancient law.[4] But the Bombay High Court held

[1] Mitákshará, 2, 8, 1-9; Dáyabhágá, 11, 6, 35-36.
[2] Víramitrodaya, p. 115.
[3] Punjab Records, 1874, p. 83.
[4] West and Buhler, 951, n. (e.)

that an adoption by a man who had undergone that ceremony was not invalid; and the reason assigned is, that no authority was shown as to the existence of this ceremony having been recognized by works on Hindu law.[1]

It should, however be observed that the *lex loci* Act confers upon all persons perfect freedom in matters of religion, and the rules and usages of a religious order possess no longer a binding force upon any member, who is therefore at liberty to abandon that order and adopt a different doctrine. Adoption by such a person, may of itself afford evidence of his religious belief, and its validity may be maintained upon grounds set forth for upholding affiliation by an unmarried man.

**Capacity of disqualified persons to adopt**—Persons that are excluded from inheritance do not appear to be on that account incapacitated for adopting sons. Most of them, including the impotent person, can marry; and marriage and adoption are closely analogous, consisting as they do of gift and acceptance accompanied by religious ceremony. There may doubtless be a practical difficulty for them to have a son by reason of their having no patrimony; but it is common to all poor men. And though debarred from inheritance, they may nevertheless be possessed of property received by gift, devise or other means.

Colebrooke's English version of a certain passage of the Mitákshará, is the only authority for denying them the power of adoption. The author of that treatise, while dealing with the subject of exclusion from inheritance, explains the text of Yájnavalkya,[2] enumerating the disqualified persons, and declaring their exclusion from inheritance and their right to maintenance; and then cites[3] the next text which runs as follows:—"But their Aurasa and Kshetraja sons are entitled to allotments, if free from similar defects." The author's comments on this passage are translated by Colebrooke thus:—"The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency and the like. Of these two descriptions of offsprings, the impotent man may have that termed issue of the wife; the rest may have legitimate progeny likewise. The specific mention of 'legitimate' issue and 'offspring of the wife' *is intended to forbid the adoption of others.*"[4] The part italicized does not appear to be a correct rendering. The original is औरस-क्षेत्रजयोर्वचनं इतरपुत्रप्रतिषेधार्थम्, which means,—The specific mention (in the above text of Yájnavalkya) of Aurasa and Kshetraja *is intended to exclude other sons (from inheritance)*. What is here laid down is, that when the disqualified persons have sons of th

[1] Mhálsá Bái *v.* Vithobá Khandáppá, 7 Bom. H. C. R., App. xxvi.

[2] Yájnavalkyá, 2, 141; Mitákshará, 2, 10, 1-8.

[3] Yájnavalkyá, 2, 142; *Ibid.*, 2, 10, 9.

[4] *Ibid.*, 2, 10, 10-11.

body or sons of the wife, these sons if not themselves disqualified will take allotments such as their fathers would have taken on partition of the family property had they been free from disqualification; but if the disqualified persons have any other descriptions of sons, they will not be entitled to any share, on the principle of *expressio unius excludio alterius*. There is nothing in the passage which may be construed to forbid the adoption of other sons.

The author of the Dattaka-Chandriká recognizes their power of adoption, and construes the text of Yájnavalkya in the same way as it has been interpreted by the Mitákshará:—"As the blind, the lame and the like sons are not entitled to inherit,—and since it is ordained (by Yájnavalkya) that their Aurasa and Kshetraja sons only, participate in the estate of the paternal grandfather; a Dattaka or other description of son affiliated by them, has no right to the estate of the paternal grandfather: but to maintenance only. For maintenance being provided for the wives of persons blind and so forth, maintenance for their adopted sons is inferred *a fortiori*. Accordingly, having previously declared sons blind, lame and the like to be incompetent to inherit, (Yájnavalkya) adds,—'But their Aurasa and Kshetraja sons are entitled to allotments, if free from similar defects; their sonless wives, conducting themselves aright, must be supported; and their daughters must be maintained, until they are provided with husbands.'"[1]

The same view is taken by Sutherland who says:—"The more correct opinion, however, appears to be, that an adoption, by any of the persons described, would be valid: though it seems reasonable that the affiliation by one excluded from inheritance, should confer no right of succession on the adopted, of which the adopter is debarred by law."

It is worthy of remark that so far as the rights of the boy adopted are concerned, an adoption by a person excluded from inheritance is similar to an affiliation by a man having a qualified son in existence; in both instances, the sons adopted are entitled only to maintenance; and there is no sound reason why the adoption should be considered valid in the one case and invalid in the other.

**Adoption by one degraded or an outcast.**—According to the sages, commission of certain offences involves degradation which is of three degrees in proportion to the gravity or enormity of the misconduct, namely, *Mahá-pátaka*[2] or worst degradation, *Anu-pátaka*[3] or lesser degradation, and *Upa-pátaka*[4] or light degradation. Mahá-pátaka or worst degradation is punishable by expulsion from caste; and the offender is considered to be dead, and Hindu law directs the performance of exequial ceremonies for him, as if he were naturally so.[5]

[1] Dattaka-Chandriká, 6, 1-2.
[2] Manu, XI, 55.
[3] Manu, XI, 56-59.
[4] Manu, XI, 60-67.
[5] Manu, XI, 183-184.

The *Mahá-pátakas* or the most heinous offences meriting excommunication are slaying of a Bráhmana, drinking spirituous liquors, theft, incest with the wife of an ancestor, and association with persons guilty of these crimes.[1] Theft was considered a very heinous crime in ancient times, and it was formerly punishable by death in England. Persons guilty of misconduct causing lesser degrees of degradation, which might be expiated by atonement, were not excommunicated if penitent; and were not intended to be excluded from inheritance, although the general word *patita* or degraded, is used in the texts enumerating persons disqualified to inherit.

These provisions of the ancient Hindu law were, as regards association with sinners, abrogated by the Áditya-Purána,[2] and have now ceased to be legally enforced by the operation of the *lex loci* Act, and to a certain extent, they are no longer morally enforced by the Hindu society, as drinking spirituous liquors has almost ceased to be regarded as a heinous sin.

As regular excommunication is not found at the present day, and as persons who might be outcasted, are not liable to be deprived of their civil rights, the question of their capacity to adopt is not expected to arise. Nor can there be any valid objection to their adopting sons: the exclusion from the communion of the Hindu religion cannot incapacitate them, any more than the Jainas, for affiliating sons.

**Adoption by an idiot or a lunatic** appears to be liable to serious objection, regard being had to its consequences on the adopter's property. Adoption is in fact the appointment of an heir to his estate in all cases, and when he is governed by the Mitákshará school, it involves the introduction of a co-heir as regards the ancestral property; the effect of adoption is to divert the legal course of succession and inheritance in all cases, and to deprive the adopter partially of his rights in property under the Mitákshará. In this view adoption is a transaction affecting the adopter's property and partakes of the nature of a disposition of the whole of his property, which is detrimental to his interest, and which a man wanting discretion and intelligence is not legally competent to make. In this respect an adoption stands precisely on the same footing as a contract or a disposition of property. Adoption, again, consists in the acceptance of the gift of a son, but acceptance requiring as it does consent, and exercise of discretion, on the part of the acceptor, cannot possibly be made by a man of unsound mind. It follows therefore that no adoption can legally be made by an idiot or an insane person, as it would not be his act, but one done by some other person on his behalf.

**Adoption by a man in extremis.**—Upon the same principle the Privy Council[3] set aside an adoption and a will alleged to have been made by a dying

[1] Manu, XI, 55. [2] Lecture, III, p. 95.

[3] Tayammaul v. Sashachalia, 10 Moore's I. A., 429.

man, "almost continually insensible, though occasionally roused to consciousness by loud tones or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility with his mind quite inert and instantly fatigued upon the slightest exertion. Their Lordships observed,—"How is it possible that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake, to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion."

It appears therefore necessary for the validity of an adoption made by a sick and dying man that he should be in a sound state of mind, and that there was neither undue influence nor importunity exercised on him. An adoption by a person in a disturbed state of mind, arising from dangerous illness, by verbal declaration, without performance of the prescribed ceremonies was held invalid.[1]

**Adoption by a leper.**—Leprosy is such a terrible and loathsome malady that people regard it with some degree of superstitious fear and abhorrence, and in several systems of law the unfortunate man afflicted with it, was excluded from inheritance. A leper could not inherit in Normandy, nor could he inherit gavelkind land in Kentshire in England down to the reign of John.[2] The Hindu law enumerates a leper as one of those disqualified to inherit; some sages expressly mention a leper in the list of disqualified persons, while others do not enumerate a leper but exclude persons afflicted with an incurable disease;[3] hence taking these passages together, it has been understood that leprosy when incurable is a cause of exclusion, and it has been held that it is a ground of disqualification when it assumes a virulent and aggravated form of the sanious and ulcerous type.[4] In Bengal a further concession is made that expiation removes the disability.[5] But it should be observed that if the succession opens before the disease makes its appearance, it will not divest the property already vested, although in the Mitákshará, a person will be deprived of any share of the joint patrimony, if before partition he becomes afflicted with the malady, in the same way as in the case of insanity.[6]

[1] Bullub Kant *v.* Kishenprea, 6 Beng. Select Reports, 219.

[2] West and Buhler, p. 579.

[3] See Dáyabhága, V, 7 and 10-13.

[4] Jonardhan *v.* Gopal, 5 Bom. H. C. R., A. C., 145; Ananta *v.* Ramabai, I. L. R., 1 Bom., 54.

[5] Bhoobunessuree *v.* Gouree Dass, 11 W. R., 535.

[6] Rám Sahye *v.* Lalla Laljee, I. L. R., 8 Calc., 149; Ram Soonder *v.* Ram Sahye, *Idem.*, 919.

Exclusion from inheritance, however, does not, as we have already seen, affect the capacity to adopt. A leper, again, may be possessed of inherited property, if inheritance of patrimony be taken as a qualification for the capacity to adopt.

The only ground of objection against an adoption by a leper appears to be that a man in an impure state of body cannot perform any religious rite. Assuming the latter proposition to be correct, leprosy would be a disqualification for adoption in the case of the three superior tribes in the present state of law, according to which no religious ceremony is necessary for a valid adoption by a Súdra.[1]

The doctrine of incapacity of a leper to adopt has originated in two opinions delivered by Pandits in cases Nos. XX and XXI under the head of Adoption in Macnaghten's Precedents of Hindu Law. In the first a leper is declared incompetent to adopt a son, for he bears the impurity till *death;* in the second, this proposition is qualified, and it is affirmed that a person afflicted with leprosy or the like disease, after his performance of the prescribed penance, becomes purified and is competent to perform Párvana Sráddha or the religious ceremony of ancestor-worship, and therefore also to adopt a son. The law officers omit to support their opinion by any authority, but with it Macnaghten agrees, as Jagannáth supplies the omission by laying down that expiation enables a man afflicted with elephantiasis, or other similar disease, to perform acts of religion ordained in the Veda, and therefore renders him also competent to inherit.

But is not the performance of the prescribed penance, itself a religious rite? How can a leper perform it, if he were incapacitated for performing religious rites? The correct view appears to be that he cannot *personally* take part in a religious ceremony owing to the impure state of his body, but he is competent to celebrate religious rites which must be vicariously performed by a person appointed by him, or by the priest himself. But as leprosy is supposed to be a divine punishment for a Mahá-pátaka or a sin of the worst type committed in this life or in a former state of existence, and as such a sin excludes a man from the communion of Hindu religion, the leper is required to perform a penance for the sin which has not yet been fully atoned for, as otherwise his sufferings would have ceased. I shall presently show that impurity arising from bodily state, or pollution arising from death or birth of a relation, is not recognized as an insuperable bar to the performance of a religious rite.

Besides, there cannot be any reasonable objection against an adoption by leper's wife under his permission. Authorizing one's wife to adopt is not religious rite and may be done as well by a leper as by any other person.

[1] Indromani *v.* Behari Lall, I. L. R., 5 Calc., 770; 6 C. L. R., 183; L. R., 7 I. A., 24.

**Age of adopter, and adoption by minors.**—Under ordinary circumstances no prudent man ever thinks of adopting a son unless and until he becomes hopeless of having a begotten son. The Civil Code of France permits persons to adopt, only when they are above the age of fifty years.[9] But the Hindu law does not provide any maximum age for the purpose of prohibiting adoptions by persons under such age; it is entirely silent on the point. There are on the contrary, passages of law, laying down the mode of distributing a man's estate between his adopted son and a begotten son that may be born to him after adoption; which clearly indicate that the condition of being hopeless of having a son of the body, however natural and reasonable it may appear, was not annexed to the power of adoption.

The Dattaka-Mímánsá appears to support the same view, for, while explaining the word *always* in the text of Atri,[10]—"By a sonless man alone should a substitute for him be made always,"—Nanda Pandita observes,[11]—"The term 'always' shows that, in the present case, a man is not required to wait for any definite period such as is laid down in the text,[12]—"A barren wife may be superseded by another in the eighth year; she, whose children are still-born or die in infancy, in the tenth; she, who brings forth only daughters in the eleventh; she, who speaks unkindly, without delay." The author seems to think that a married man may at his discretion adopt a son whenever he is inclined to do so.

But although there may not be a rule of law, imposing any restriction upon a person of mature age and understanding, with respect to the exercise of the power of adoption,—yet an important question arises whether there is any limit as to the minimum age under which a person should not be permitted to adopt. The question is beset with considerable difficulty in consequence of there being no express rule of Hindu law on the matter; and the solution of it must therefore depend upon general principles of law, and analogies.

It is worthy of remark here that as adoption imitates nature, the relative age of the adopter and the adoptee should be such that the one may look as the son of the other. Accordingly it was required by Roman law that the adopter should be older than the person adopted by full puberty—that is eighteen years.[1] The same thing appears to be implied by Saunaka's text which says that the boy adopted should bear the reflection of a son;[2] though it has been explained by Nanda Pandita in quite a different way. He says that the boy should be one who is capable of being begotton on his natural mother by the adoptive father. This explanation is, no doubt, given for a different purpose,

[1] Code Napoleon, lib. 1, tit. 8, sec. 1. [2] Dat.-Mím., 1, 8. [3] Dat.-Mím., 1, 53.

[4] Manu, IX, 81; I give the whole text of which a part only is cited in the Dattaka-Mímánsá, 1, 53.

[5] Justinian's Institutes, 1, 11, 4. [6] Dattaka-Mímánsá, 5, 15.

but it has also an important bearing on this question. Judged by this test an adoption by a minor appears most unreasonable.

Considering the object and the legal incidents of an adoption, the question should be decided, having regard to both civil as well as religious considerations. I have already told you that an adoption being an appointment of an heir, resembles a Will in all cases; but it is attended with more serious consequences than a Will, for the boy adopted is entitled to become an heir not only of the adopter but also of his relations, and to become his coparcener under the Mitákshará school. Therefore the same reasons that require majority of a man for his competency to bequeath his property by a Will, apply with greater force to an adoption; for both are acts requiring judgment and reflection. But the Legislature while fixing the age of majority after the eighteenth year in ordinary cases, and after the twenty-first for those that are placed under the Court of Wards or under guardians appointed by a Court of Justice, has thought it fit to exempt from the operation of these provisions the capacity of any person to act in matters of marriage and adoption inasmuch as both of them are connected with religious considerations.[1]

The Legislature, however, does not appear to lose sight of the civil aspect of adoption by minors. Regulation X of 1793, section 33 provides that an adoption is not competent to a minor without the previous consent of the Court of Wards; and considering the principle underlying this rule, the Sudder Court of Bengal held that this prevented the minor equally from giving a power to adopt.[2] These rules have, with an important modification, been embodied in the present Act IX (Bengal Council) of 1879, section 61, which says,—"No adoption by any ward, and no written or verbal permission to adopt given by any ward, shall be valid without the consent of the Lieutenant-Governor, obtained either previously *or subsequently* to such adoption, or to the giving of such permission, on application made to him through the Court." These enactments provide a sort of guardianship of minor wards for the purpose of adoption. No such provision, however, is made in Act XL of 1858 which provides for the care of the person and property of other minors in the Presidency of Bengal. It has therefore become incumbent on the Courts of justice to decide whether or not adoption is competent to minors.

Religious considerations are the only grounds upon which a Court of justice may be induced to uphold an adoption by a minor, for it does not secure any temporal benefits for him, but may rather be injurious to his interests. I have already told you that the religious duty of adoption attaches to a married man failing to get male issue. And regard being had to the provisions of the Codes, relating to the religious duties in the successive stages of life, the

[1] Majority Act No. IX of 1875, Section 2.

[2] Anandmoyee Chowdrain *v.* Sheebchandar Roy, S. D. A. R., 1855, p. 218.

cannot be any doubt that a man cannot contract a marriage during his minority without a breach of religious duties. He is to commence the study of the sacred literature at the eighth year,[1] to prosecute his studies for a period, at the lowest, of twelve[2] or nine[3] years, and after the studentship is over, he is to become a householder by marrying a damsel before her puberty.[4] He may, on the lowest calculation, get a son at the age of twenty, and failing to get one, may adopt. It follows therefore that religious considerations can by no means be put forward for supporting an adoption by a minor. Adoption by a sonless person is no doubt represented by Nanda Pandita as an imperative religious duty, but it has its proper season.

It may no doubt be objected that studentship for a long time being prohibited by the Áditya-Purána,[5] the period prescribed for it should not be taken into account in calculating the nubile age of a man. Assuming the objection to be a correct one, it does not affect the question, whether a minor may contract a religious marriage, that is, one according to the Shasters. There is nothing to be found in the Shasters contemplating marriage by a man in his minority. The Hindu law does nowhere provide guardianship of a male for the purpose of his marriage. On the other hand its provisions on the subject show that a man is to choose his own wife, and to maintain and protect her, himself. A perusal of the prescribed ceremonial law of marriage cannot leave any doubt on the mind that the bridegroom passing through the rites must be a grown up man of mature understanding. Manu ordains,[6]—"A man, aged thirty years, may marry a girl of twelve years, (if he find one) dear to his heart; or a man of twenty-four years, a damsel of eight: but, if (he finish his studentship earlier, and) the duties (of his next order) would otherwise be impeded, let him marry earlier."[7] Whatever interpretation you may put upon this passage, it shows beyond the shadow of a doubt that the marriage of men during minority cannot be justified on religious grounds. Far less can an adoption by a minor be supported by religious considerations.

But a contrary view is entertained by Pandita Bharatchandra Siromani, the writer of Sanskrit commentaries on the Dattaka-Mímánsá and the Dattaka-Chandriká, who in the Bengali synopsis appended to his edition of the works, says that "both male and female infants may adopt sons, infancy not being a bar to the performance of religious rites."[8] This view is apparently based on the following passage of revealed law, cited in the Dattaka-Mímánsá,—"A Bráhmana immediately on being born, is produced a debtor in three obligations:

[1] Manu II, 36. [3] Manu III, 1. [5] See Lecture III, pp. 95, 96.

[2] Apastamba I, 1, 2, 16. [4] Dáyabhága XI, 2, 6. [6] Manu, IX, 94.

[7] The last clause admits of another interpretion, namely, 'one who marries earlier departs from the path of virtue.'

[8] Vyavastha Darpana, p. 770, (2nd Edition).

to the holy saints, for the study of the Vedas; to the gods, for the performance of sacrifice; to his forefathers, for offspring. And he is absolved from debt who has a son, has performed sacrifices, and has studied the Vedas." It should, however, be observed that although the passage declares that he becomes a debtor from the moment of his birth yet it cannot reasonably be contended that any of the three debts may be discharged by an infant. The learned Pandit in his commentary observes that the term "on being born" (जातमात्रः) intends the second birth or investiture with the sacred thread when a man becomes twice-born, and begins to study the Vedas and thereby discharges one of the obligations. Surely before one attains the proper age for that ceremony none of the three duties can be discharged. But it does not follow that because he is capable of performing one of the duties, his capacity to discharge the others arises. The Dvaita-Nirnaya explains the term "on being born," to mean, "on becoming a *grihastha* or householder," for the purpose of discharging the other two duties. This view is perfectly consistent with the spirit of Hindu law, a man can neither perform sacrifices nor have a son before becoming a householder. A student is not required to perform sacrifices. It should be borne in mind that it is an imperative religious duty to have a begotten son, and that an adopted son is to be substituted on failure of a son of the body. How can then a man who is incapable of getting a real son, be, for religious considerations, permitted to adopt? The venerable Pandit Bharat-Chandra's opinion appears to have been influenced by the assumption which is not always legally correct, that an obligation and the capacity and liability to discharge it, must be co-existent in point of time: and the interpretation which he puts on the term "on being born," is certainly most ingenious, but nevertheless his conclusion seems to be one-sided, based as it is, entirely upon the above passage, which should consistently with the whole system of religious duties prescribed by the sacred writings be construed to require a man to have a begotten son. It should moreover be observed that pushed to its logical consequences, the Pandit's view will justify an adoption even by a boy of eight years. The Hindu legislators, however, do not appear to be so devoid of common sense, as to contemplate such an absurdity.

In the Vyávastha-Darpana of Babu Shamacharan Sarkar[1] the above opinion of Pandit Bharat Chandra Siromani, and another elaborate opinion to the contrary, written by Babu Prosanna Coomar Tagore, are cited. And the learned author of that valuable work endeavours to reconcile the contradictory views by suggesting that an adoption by a minor having discretion would be valid for religious purposes alone, and will entitle the adoptee to maintenance; but it would not be valid for civil purposes, so as to invest the adoptee with

[1] Pages, 770-776, (2nd Edition).

all the rights of a son, and entitle him to inherit the estate of his adoptive father.

In the case of *Rajendra Narain Lahoree* v. *Saroda Soondaree Dabee*,[1] the High Court of Bengal observed that the obligation of a childless Hindu to adopt a son must be necessarily considered as imperative, as a matter of religious duty; he is bound to adopt a son if he be at all anxious for his own salvation; and what is required to be done for that end, is not optional with him; and held that an adoption is not invalidated by the mere fact of the adoptive father being a minor, if he has attained years of discretion; and that an adoption by a minor is not attended with any civil disability of the adoptee, such as is suggested by Babu Shamacharan Sarkar.

The following observation made by the Court in this case shows that the principle of this ruling is not applicable to an adoption by a minor governed by the Mitákshará school, because it is manifestly prejudicial to his interests:—"Every act done by a minor is not necessarily null and void. Those acts only which are prejudicial to his interests can be questioned and avoided by him after he reaches his majority. But no such prejudicial character can be predicated of adoption in the case of a childless Hindu, and as under the Hindu Shasters a minor who has arrived at the age of discretion is not only competent, but bound to perform the religious ceremonies prescribed for his salvation, we cannot hold the adoption made in this case to be invalid, merely because the adoptive father was in the eye of the law a minor."

The Court do not point out any particular period as the age of discretion; and if discretion be the only test, an adoption by a boy of eight years who may be proved to possess discretion, would, according to this decision as well as to Pandit Bharat Siromoni's opinion, be perfectly valid; for when such a boy is, under the Indian Penal Code liable for a criminal offence,[2] why should he not have the right to adopt.

In the case of *Jamoona Dassya* v. *Bama Soondari Dassya*,[3] the Privy Council held that according to the law prevalent in Bengal, a lad of the age of 15 or 16 is regarded as having attained the age of discretion, and is competent to give authority to adopt a son. According to Hindu law the sixteenth year is the age of majority, but it is not clear whether the Privy Council intend to lay down that to be the lowest age for discretion in matters of adoption,—or leaves that to be decided in every case as a question of fact.

But it should be observed that the capacity to adopt, and the capacity to give permission to adopt, do not always co-exist, for a man having a son though incapable of adopting may yet give a valid authority to be exercised by his

[1] 15 W. R., 548.

[2] See Indian Penal Code, Act XLV of 1860, Section 83.

[3] I. L. R., 1 Calc., 289.

wife in case the son dies. But with respect to a minor, both the capacities stand precisely upon the same footing. No case of adoption by a minor male has as yet arisen; the above two cases relate to authority to adopt, given by a deceased minor to his wife.

**Effect of pollution on adoption.**—According to the Shasters a man cannot personally perform religious rites during the period of pollution arising from death or birth of any relative. The period of pollution varies with the caste and nearness of relationship. The extreme period for Bráhmanas is 10 days, for Kshatriyas 12 days, for Vaisyas 16 days, and Sudras 30 days. The impurity continues for these periods when the relative, born or dead, belongs to the same family and is within seven degrees according to the Hindu mode of computation of degrees; and in other cases the period of pollution continues for three days or one day or till ablution, among all the castes. But on the death of a man's parent or a woman's husband, the impurity lasts for a whole year.

The ceremony of adoption being a religious rite it may be contended[1] that an adoption made during pollution is invalid. This objection cannot now arise in the case of a Súdra adoption, as it has been held, that the *Homa* or other religious ceremony is not necessary for the validity of an adoption made by Súdras.[2] The question may arise in those castes amongst whom adoptions must be attended with religious ceremony.

There is no express rule on the subject, laid down anywhere. But it appears from what is affirmed with respect to other religious rites, that the mere fact of any of the parties to an adoption being under pollution cannot invalidate an adoption. For adoption is regarded as an imperative religious duty, and as such may be performed even during pollution, the religious rite being vicariously performed by certain relations of the adopter's with his assent, or by his priest. This conclusion follows by analogy from what Raghunandana says with respect to the worship of the goddess Durga.

In the Tithi-tattva, Raghunandana maintains that the worship of the goddess Durga every year in the month of Ásvina is a *nitya* or imperative religious duty, and not a *kámya* or optional rite.[3] Later on,[4] he considers the question whether a man under pollution is competent to worship the deity, having regard to the maxim that religious duties attach to a person, "provided he be *pure* and living at the time." He does at first cite the following text of Daksha,—"The spiritual merit, however, which proceeds from a religious ceremony personally performed, does not arise when the same is done by another;

[1] Ramalinga Pillai *v.* Sadasiva Pillai, 9 Moore's, I. A., 506; 1 W. R., P. C., 25.

[2] Indromani Chowdhrani *v.* Behari Lal Mullick, I. L. R., 5 Calc., 770; 6 C. L. R., 193; L. R., 7 I. A., 24: Thangathanni *v.* Ramu Mudali, I. L. R. 5 Mad. 358.

[3] See Raghunandana's Ashtávinsati-tattva, Serampore Edition, Vol. I, p. 41.

[4] *Ibid.*, p. 43.

but a priest, a son, the spiritual preceptor, a brother, a sister's son and a son-in-law,—whatever ceremony is vicariously performed by these, it is certainly the same as personally performed by himself." Then he quotes another passage attributed to Nárada,—"A priest is found of three descriptions, one appointed by ancestors, one appointed by a man himself, and one performing the priestly function of his own accord, out of affection." From these passages and others, the author concludes that although during pollution, a man cannot formally appoint a priest to vicariously perform the ceremony for him, yet his family priest may of his own accord, conduct the worship, and he will reap the spiritual benefit flowing therefrom.

Thus it is clear that a ceremonial adoption may likewise be made during pollution, the family priest performing the religious ceremony. Besides, under certain circumstances it appears to be perfectly consistent with the spiritual object of adoption that it should take place during pollution. For instance, suppose a man dies giving permission to his wife to adopt a son. The widow's impurity lasts for a year, but as the existence of a son is absolutely necessary for the salvation of her deceased husband's soul, the sooner it is made, the better for his spiritual benefit. Therefore the vicarious performance of the ceremonial portion accords best with the urgent and imperative character of the duty; and there is ample authority for the same.[1] The performance of ceremonies by a delegate, is, as we have already seen, permitted by the Shasters, and is found in connection with adoption itself.[2]

**How far capacity affected by agreement not to adopt?**—In family arrangements entered into by members of a joint Hindu family, an agreement is sometimes made that neither they nor their lineal male descendants shall be able to adopt a son, and if any of them do so, the son so adopted shall not be entitled to their property. In such cases the question arises whether the agreement is binding on their descendants, or even on the parties to it, so as to invalidate an adoption made in contravention of it. In one case two brothers composing a joint undivided family governed by the Mitákshará, stipulated as follows:—"As for the immoveable property belonging to us both, the said property shall, in case of the failure of aurasa (self-begotton) male issue in either of these two lines, *i. e.*, either for yourself or in your line of aurasa sons, or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." But notwithstanding this, the son of one of them did adopt a son. The Privy Council upheld the adoption, and ade the following observations:[3]—"It is unnecessary for their Lordships to

[1] But see Ranganayakamma *v.* Alwar Setti, I. L. R., 13 Mad., 214.

[2] Vijiarangam *v.* Lakshuman, 8 Bom., H. C. R., O. C., 244; Jamnabai *v.* Raychand Nahalchand, I. L. R., 7 Bom., 229.

[3] Suriya Ráu *v.* Rájá of Pittapúr, I. L. R., 9 Mad., 499.

determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of Gangádhara could not bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt, the son so adopted should not inherit. The words are :—'In case of the failure of self-begotten male issue.' Mr. Mayne was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It appears to their Lordships that that would be entirely altering the law of descent, and contrary to the principle laid down in the Tagore case.[1]

It is doubtful whether such an agreement is binding even between the parties. With respect to a somewhat similar arrangement the High Court of Bengal observed that the general scheme of it is such as cannot be binding except upon the actual parties to it; but pronounced the clause containing the agreement, to be inoperative, as it attempted to establish a new line of descent somewhat analogous to descent-in-tail-male.[2] Whatever effect a contract of the kind may have upon the property affected by it or upon the liability of a party for its breach, it does not seem to have the effect of invalidating an adoption made in spite of it, for it cannot affect the status of the boy adopted who is not a party to it.

**Can a father restrict a son's capacity to adopt?**—It is settled by the Privy Council that by an agreement of the above description, a father cannot bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt, the son so adopted should not inherit. The parties in that case, however, were governed by the Mitákshará according to which, the son was co-heir of his father with respect to the estate which was ancestral. In the Bengal school the law may be different because a father possesses an absolute right in the ancestral estate. In construing a Will, the Supreme Court of Calcutta made the following observation,[3]—"It was objected by the Cowar's Counsel that his father had no power to postpone his right of adoption to the age of eighteen; but the answer to this is, that though he may have no power to limit his son's general rights of adoption, he may certainly limit the right to adopt with reference to the estate and property which his son takes as his heir." It should be observed that although a father may morally enforce his son to comply with his directions concerning adoption, by a valid gift over of his property in the event of the son's non-compliance with his directions, he can by no means invalidate an adoption by his son who is otherwise competent to adopt.

**Wife's assent to an adoption by the husband.**—With respect to relative rights of husband and wife to adopt a son, Nanda Pandita lays do

[1] 9 B. L. R., 377, 403; 18 W. R., 359.

[2] Rajender Dutt *v.* Shamchand Mitter, I. L. R., 6 Cal., 106.

[3] Ranee Hurrosoondery *v.* Cowar Kistonauth Roy, 1 Foulton, 393, 394.

that a woman cannot adopt except with the assent of her living husband which is requisite for constituting the boy adopted by the wife, his son; and then goes on to consider whether the assent of the wife is necessary for an adoption by the husband. He observes:[1]—"Should it be urged that if that be the case then the assent of the wife would be requisite for the husband also, by reason of the purpose (of the assent) being the same; the answer is, that it is not maintainable, for in consequence of the superiority of the husband, by his acceptance alone, the adopted becomes the son of the wife also, in the same manner as she acquires a right to any other thing accepted by the husband." Thus, it is clear that the assent of the wife is not requisite for the validity of an adoption made by the husband alone. Although Nanda Pandita appears to intimate that a boy so adopted becomes also a son to the wife, yet it must not be supposed that a son adopted without the concurrence, or against the will, of the wife acquires all the rights of a son to her. For, a son of the husband by another wife is also declared to become a son to a woman;[2] hence although such a son like a co-wife's son, may confer spiritual benefits on her, he cannot confer such benefits on her ancestors. In order that the affiliation may be complete, it appears to be necessary that the wife also should join in adopting a son. Nanda Pandita appears to intimate the same view in the following passage,[3]—"The forefathers of the mother that *accepts* in adoption, only, are also the maternal grandsires of sons given and the rest." If the husband alone or with one wife, adopts a son, then his wife or another wife respectively not joining the husband in the act of adoption, cannot be called the mother that accepts in adoption (प्रतिग्रहीत्री या माता).

[1] Dattaka-Mímánsá, 1, 22; Sutherland's rendering is liable to be misconstrued.

[2] Dat.-Mím., 2, 69-70; Dat.-Chand., 1, 25-26; Víramitrodaya, p. 116.

[3] Dat.-Mím., 6, 50.

## LECTURE VI.

## CAPACITY OF FEMALES TO ADOPT.

General observations on woman's capacity to adopt—Rishi texts on their capacity—commentators on the same—Váchaspati Misra—Nanda Pandita—The Dattaka-Chandriká—Jagannátha—Mitra Misra—Nílakantha—The Dattaka-Darpana—The Dattaka-Dídhiti—Summary of the different views—In what character does a woman adopt?—Adoption by unmarried females—Adoption competent to married women and widows—Different Schools on the condition for women's capacity for adoption—Mithila School—Bengal School—Benares School—Madras, Bombay and Punjab Schools—Adoption without authority peculiar to Bombay and to the Jainas—Modern view of women's capacity to adopt—Bengal School, husband's assent is regarded as power—Conditional authority by husband having an existing son—Restrictions imposed by husband—Power to be exercised with consent of others—Void authority—Authority strictly construed—Authority admits of a liberal construction—Authority how given—Revocation of authority—Suspension of authority—Invalidity of adoption then made—Revival of authority—Power given when there are two or more wives—Widow not bound to adopt—Adoption by a widow, not a free agent, or minor—No limit of time for adoption by widow—Unchastity or remarriage of widow—Mitákshará School on adoption by widow with husband's authority—Benares Subschool—Adoption with kinsmen's assent in Madras, Bombay, and the Punjab—Consent of members of joint family—Whose consent when husband separate?—Effect of improper motive—Assent implies conscious exercise of discretion—Effect of husband's prohibition express or implied—Competition between mother-in-law and daughter-in-law—Bombay School and adoption without any authority.

**Woman's capacity to adopt.**—Capacity of a female to adopt a son appears to be inconsistent with the position assigned to women by ancient law. Women, according to early law, could not become *sui juris* in any period of their life, being placed under the power of some one or other of their male relations. They could doubtless be mothers of children in any stage of their life, but these belonged to the persons under whose power their mothers were placed. Thus the Kánína son brought forth by an unmarried woman became the son of her father; the Gúdhaja or the son secretly produced by a woman belonged to her husband, and the Paunarbhava child or one born of a twice-married woman belonged to her second husband. Women not being entitled to independence, were placed under the control of men, and were not competent to exercise *patria potestas* over their own children, who passed under the power of the persons who held the *patria potestas* over their mothers. Women who, according to ancient law, belonged to one family or another, could not themselves be founders of new families: hence a woman is said to be the beginning and end of her family.

The capacity to adopt is intimately connected with the capacity to hold property, and adoption consisting in the transfer of dominion over a child, appears to have been incompetent to a person incapable of holding property. But women were not entitled, according to ancient law, to acquire and hold any property for themselves, for they themselves were something like property belonging to the person under whose power they happened to be; a son adopted, like anything acquired, by them would at once belong to that person. Women were also, according to the same principle, excluded from inheritance.

In course of time, however, the position of women was improved: the Hindu lawgivers recognized to a limited extent their right to hold property acquired by gift from their relations, as well as their right to inherit from their husband, father, mother, son and son's son. The Mitákshará seems to confer higher rights on women, by maintaining that *stridhanam* or woman's property has no technical meaning,[1] and that a woman may hold and acquire property in all the modes of acquisition without any distinction. According to that school even property inherited by a woman becomes her *stridhanam*.[2] The author of the Dáyabhága, however, whilst he recognises the heritable right of the females even to the undivided shares of male members of joint families, imposes restrictions and limitations upon the estate taken by them in property inherited from males, so that such property cannot come under the category of woman's property. And the Dáyabhága rules are on the whole beneficial to women, but they have been extended to cases governed by the Mitákshará, according to which the female heirs may inherit only in the exceptional circumstance of the deceased male proprietor, not having been a member of a joint family, or having no male co-heir. Under the Dáyabhága women are permitted to enjoy special privileges which are counterbalanced by the disabilities of female heirs with respect to inherited property, introduced by the founder of the Bengal School for the benefit of the nearest male relations who, according to the Mitákshará, exclude the female heirs, but whom the Dayabhága postpones to the females in the order of succession. The position of women under the Mitákshará has thus become worse, as they have been subjected to the disabilities of the Bengal School, though not entitled to the privileges conferred on women by that School. But, however that may be, it is now admitted on all hands, that women may hold and deal with property independently of their husband; and if adoption be regarded as the appointment of an heir, there is no reason why they should be debarred from affiliating a son.

The creation of artificial relationship amongst the modern Hindus is due, to a great extent, to the influence of females; for, though possessed of male issue they are found anxious to have such nominal sons as the Bhikshá-putra,

[1] Mitakshara, 2, 11, 3.

[2] *Ibid*, 2, 11, 2 and 30.

the Dharma-putra and so forth. The secular motive for adoption operates strongly on the mind of Hindu females whose helpless situation if they are destitute of natural guardians, renders it necessary for them to have some one for the protection of themselves and their interests; and if adoption be competent to them, it would secure a protector and heir, on whom they might lavish the family affection which is so strong amongst Hindus and especially among their females.

As regards the principle of spiritual benefit derived from male issue, it is applicable as well to females as to males, for women also have a soul to save. The offering of funeral oblations of food and libations of water, and the performance of exequial rites, for which a son is desired, are equally necessary for deceased females, and the ceremonies are actually performed for the benefit of their soul. But if sons were considered necessary for the spiritual benefit of women, it would follow that they need not *adopt* a son when they may have a son of their body, and widows might choose to marry a second husband for that purpose. The rishis, however, recommend single-husbandedness to women, and anticipating the objection against that doctrine in cases of sonless widows, based upon the necessity of sons for spiritual benefits, they obviate it by declaring that widows leading a chaste life and practising austerities, ascend to heaven though destitute of male issue[1] in the same way as life-long students who observe celebacy. The appointment of a sonless widow to raise issue or her re-marriage, which could be supported by the doctrine of necessity of a son for spiritual purposes, are accordingly censured and disapproved by the sages, and are prohibited by the Áditya-purána. In fact, the idea of a woman having a son independently of her first husband is condemned: and the approved opinion is, that a woman must not think of having a son of her own, exclusively of her first husband. But it should be observed that the relation between a mother and a real son is a natural one, and as the law cannot override nature, and women are not now dependent in the manner contemplated by early law, they may have sons of their body though not through their husband. Whether or not the law will recognize the natural relationship, considering that Hindu law does not permit a woman to have a son except through her husband, is a question, which is beset with some difficulty. But, however that may be, an adoption by a woman, in whom the religious motive is stronger than in the other sex, is not open to any objection; and the Kritrima form of adoption, prevalent in Mithila, shows that Hindu law and usage are not against adoption by women.

Although the Dattaka and the Kritrima son occupy the same position according to the Hindu law as contained in the Sanskrit works of admitted authority, yet the law as to their rights has developed in diverse ways in our courts of justic

[1] Manu V, 159-162.

According to Hindu law, their mode of affiliation, only, is different, but after affiliation both of them occupy the same position.[1] The Dattaka son has, however, become a favourite of the law, and is considered to possess all the rights and privileges of a real legitimate son, whereas a Kritrima son is held to retain his position in the family of his birth, and to be affiliated only to the adoptive father or mother for the purpose of inheritance. It is, therefore, supposed that a son cannot be adopted in the Dattaka form, under circumstances in which he cannot be entitled to all the rights that are now accorded to him. Agreeably to this notion, adoptions in the Dattaka form by women are declared invalid, by reason of there being no authority of their husband, or for some other cause, although there is no reason why such adoptions should not stand good, so far as the adoptive mothers are concerned. It should be borne in mind that adoption in ancient law took the place of testamentary disposition, and a son adopted by a woman is, according to that principle, entitled to inherit the property of his adoptive mother, although for some reason or other he may not be considered to be affiliated to the woman's husband.

On the other hand, the Hindu lawgivers appear to be so unfavourable to women's rights, that it has been considered difficult to raise any presumption in favour of their capacity in any particular matter, from the silence of the lawgivers on that point. The general principle followed with respect to the females, is, that no right can be claimed by them unless it be supported by express authority. Accordingly the law of adoption has been construed most strictly against women's capacity to adopt, although the commentaries are susceptible of a liberal construction, regard being had to the ordinary rules of interpretation.

**Rishi-texts on the capacity of women to adopt.**—Although the capacity of women to give away their son in adoption is admitted by all the sages who have given a description of the Dattaka son, yet all of them, excepting Vasishtha and Baudháyana, are silent as to the power of a woman to adopt a son. The following passages of the Codes are relied upon by the commentators while discussing the question of women's capacity to adopt:—

A text of Atri and another attributed to Manu, already referred to[2], lay down a rule which, so far as regards the present purpose, may literally be stated in these words: "By one sonless alone should a substitute of son be made." It should be observed here that the term "by one sonless" in the text of Atri and of Manu, is in the masculine gender; hence literally the duty of adoption is predicated of males only; but it may be applied to females also, according to the ordinary rule of interpretation of law, that in the absence of anything contrary to the context or subject, a word in the masculine gender includes females.

[2] See Lecture V, p. 168.

With respect to woman's capacity to adopt, Vasishtha[1] and Baudhayana[2] ordain,—"Man formed of virile seed and uterine blood is an effect whereof the mother and the father are the cause; the mother and the father, (therefore), have the power to give, to sell, and to abandon him: but an only son should (or shall), certainly neither be given nor taken; since he is for continuation of the lineage of the ancestors; a woman should (or shall) neither give nor accept a son except with the husband's assent."

Women's lifelong state of pupilage is declared[3] by Yájnavalkya, thus,—"There cannot be independence of a woman in any stage of her life: let the father protect her when unmarried; the husband, when married; the sons, in the old age; in their default let their kinsmen protect her." So Manu ordains[4],—"A woman is not fit for independence: her father protects her in her maiden state; her husband protects her in youth; her sons protect her in age."

With respect to brothers and co-wives Manu ordains[5],—"If one among uterine brothers get a son, Manu pronounces that all of them become fathers of son by means of that son: if, among all the wives of the same husband, one brings forth a son, Manu has declared them all to be mothers of son, by means of that son." So Vrihaspati says[6],—"If there are several brothers, the sons of one man, by the same mother; on a son being born to one even of them, all of them are declared to become fathers of son; the same rule is also ordained in respect of many wives of the same person; for if any one of them brings forth a son, he will offer *pindas* to all."

**Commentators on the same.**—The above text of Vasishtha and Baudháyana is the only express authority on the subject of woman's power to adopt. These sages, having premised the equal capacity of both parents to give their child, goes on to restrict the mother's right by saying that "a woman shall (or should) neither give nor accept a son except with the assent of her husband." So far as the acceptance of a son is concerned, this passage has received a variety of interpretation from different commentators. These interpretations have given rise to the different doctrines that have been adopted in the several schools, in respect of a woman's power to adopt. It is necessary and interesting to go through the arguments by which the commentators deduce their respective conclusions; since these will enable you to understand the character in which a woman adopts. It should be observed in this connection that as

[1] Vasishtha, XV, 1-5; Sacred Books of the East, Vol. XIV, p. 75.
[2] Baudháyana-Parisishta, 2-6; See Sacred Books of the East, Vol. XIV, p. 334.
[3] Yájnavalkya, i, 85.
[4] Manu IX, 3; see also V, 148.
[5] Manu, IX, 182-183.
[6] Cited in Dattaka Chandrika, 1, 20 & 23; Dattaka-Mímánsá, 2, 71.

regards husband's assent to wife's gift of a son, the commentators agree in following the maxim[1],—"Assent is presumed from the absence of express prohibition."

**Váchaspati Misra** in his Viváda-Chintámani[2] respected as authoritative in the Mithila School maintains that a woman has no power to adopt a son even with the assent of her husband, because she is incapable of performing the religious ceremony of adoption; and explains Vasishtha's text permitting a woman to adopt with her husband's assent, as intending that she may be allowed by her husband to associate with him in the act of adopting a son. He argues that if the text of Vasishtha were taken to empower a woman to adopt, it would be contradictory to the rule prohibiting a woman to recite Vedik passages and to perform the *Homa* ceremony, both of which form part of the ritual of adoption; and on the very same ground he holds that an adoption is not competent to a Sudra.

**Nanda Pandita** appears to agree with him so far as to maintain that women, as a general rule, have no power of adoption, for whilst explaining the term "by a man destitute of male issue," (अपुत्रेण) in the text of Atri, he observes[3],—"from the masculine gender being here used it follows that a woman is incompetent to adopt"; and cites the text of Vasishtha in support of that explanation. But he is of opinion that Vasishtha's text contains an exceptional rule which empowers a woman in coverture to adopt with the assent of her husband; though it indicates the incompetency of a widow, as in her case the husband's assent is impossible. He discards the guardianship theory, which attributes the necessity of husband's assent to woman's condition of pupilage, and which supports the competency of widows to adopt with the assent of kinsmen declared in the text of Yájnavalkya to be protectors of widows in default of their sons, and maintains that the assent of the husband is requisite for a woman whose husband is living and is her guardian according to both Manu and Yajnavalkya. He asserts that a woman cannot adopt a son to herself alone, and that the purpose of the husband's assent being, that the son taken by her may, by means of her acceptance, become a son adopted to the husband, this purpose cannot be served by substituting the assent of kinsmen, for that of the husband, if you take the word husband as illustrative and intending a woman's guardian for the time being.

The contradiction apprehended by Váchaspati Misra on the ground of woman's incapacity for performing the religious rites of adoption, is removed by him with the argument that their competency to adopt being clearly deducible from Vasishtha's text, a dispensation with some parts of the religious rites must be admitted on the authority of the rule that,—"In cases of women and

[1] Dattaka-Chandriká, 1, 32. [2] Pp. 74-75. [3] Dattaka-Mímánsá, 1, 15.

Sudras, religious ceremonies are to be performed without reciting the Vedik prayers."

Referring to Manu's texts declaring that all the brothers, and all the wives of the same man, become fathers and mothers respectively, of male issue, if a son be born to one of them,—Nanda Pandita maintains[1] that the rule relating to brothers does not intend to constitute a fraternal nephew, a son to his uncles without adoption which is necessary to invest him with the status of a son. But the rule with respect to the co-wives, is held by him to be, of a different character[2]; a son begotten by the husband on a wife, becomes by operation of law a secondary son to his other wives; hence adoption is superfluous, and the latter are debarred from adopting another son, when a begotten son of their husband exists. It should be observed that it follows by implication that a woman may adopt a son with her husband's assent though he may have a subsidiary son adopted by him with another wife.

**The Dattaka-Chandriká**—whilst explaining the text of Atri says,[3] that the masculine gender in the term (a-puttrena) "by one sonless," is not to be understood as an essential part of the rule and denying woman's capacity to adopt; for, according to Vasishtha a woman is competent to take a son with the assent of her husband. Further on, the author referring to Manu's texts relating to brothers and co-wives observes[4] that although a fraternal nephew must be adopted in order to become a son to his uncle, the same construction cannot be put upon the passage relating to co-wives one of whom has brought forth a son; for a woman can only adopt a son to her husband, and cannot have a lineage different from that of her husband; she cannot therefore affiliate a son when her husband has a begotten son by another wife, who will preserve her lineage and confer spiritual benefits on her. Thus there being material difference between the case of brothers and that of co-wives, the interpretation of the two rules though couched in similar language must be different. Regard being had to the entire argument, the existence of a son begotten by the husband on one wife, precludes her co-wife from adopting a son; but for spiritual purposes a woman appears to be competent with the husband's assent to adopt a son notwithstanding the existence of a son adopted by the husband with another wife. With respect to the husband's assent, it is laid down in this treatise, that it may be presumed from the absence of express prohibition, as regards the wife's power of giving a son in adoption.[5] But whether the same presumption should apply to her acceptance of a son, the author is silent; the expression "husband's assent," however, is grammatically connected with both gift and acceptance in the same manner,—"Let not a woman give or accept a son without the husband's assent."

[1] Dat. Mím, 2, 29-68. [2] Dat. Mím., 2, 69-71.
[3] Dattaka-Chandriká, 1, 7. [4] Dat. Chand., 1, 23-24. [5] Dat. Chand., 1, 1.

**Jagannátha**, on reference to the above clause of Vasishtha's text, says,[1] "If a son be accepted by a wife without the assent of her husband, her property in that child is valid, but not his performance of filial duties: he can neither possess the heritage, nor perform the *sráddha* or the like ceremony, for it is shown that the adoption of a son is the act of the man; in no Code of law is it found that adoption can be the act of the woman." In order to understand what he means by "property in that child," you should bear in mind that slavery was not abolished when the author compiled the Digest.

**Mitra Misra** in his Víramitrodaya maintains[2] that a widow is not precluded from adopting a son, if her husband died without giving his sanction; an adoption of a son being conducive to the spiritual benefit of the husband, his assent may be presumed. Such a view, however, may be open to the objection that Vasishtha's text would in that case be quite unmeaning. But the author obviates it by saying that the text intends to prohibit adoption by a woman whose husband is incapable of giving assent by reason of his being *Mumukshu* or desirous of liberation, or by reason of his having a son by another wife; and in support of this position he cites Manu's text relating to co-wives, and puts the same interpretation on it, as we find in the Dattaka-Mímánsá and the Dattaka-Chandriká. He says,—"The purpose for which a son is desired, namely, the performance of Sráddha and the like, being served by the son of a co-wife, no son need be adopted by such a woman without the assent of her husband."

The author, however, goes on to observe,—"But in reality, the meaning of the part,—"except with the assent of her husband"—is, that while the husband is alive, a son shall not be adopted by the wife without the assent of the husband; but when the husband is dead, the assent of those only is necessary, on whom she is dependent. In this view, the object of the prohibition becomes reasonable, therefore, though the husband died without giving permission to adopt, yet an adoption by the widow would not be invalid." He takes the word "husband" as illustrative, and intending the legal guardian of a woman.

**Nílakantha.**—A somewhat similar view is taken by Nílakantha in his Vyavahára Mayúkha[3]; he affirms that the husband's permission is intended to be necessary only for a woman whose husband is alive, but a widow may even without it adopt with the assent of the father, or in his default with that of the kinsmen; and in support of this conclusion he cites the text of Yájnavalkya relating to women's dependence and guardianship.

**The Dattaka-Darpana.**—The author of the Dattaka-Darpana maintains,[4] upon the authority of Manu's text regarding the dependence and guardianship

Colebrooke's Digest, V, IV, VIII, 273; Madras Edition, Vol. II, p. 388.

[1] Víramitrodaya, pp. 115-119.

[2] Mandalík's Vyavahára-Mayúkha, p. 57.

[3] Pandit Bharatchandra Siromani's Dattaka-Siromani, page 32.

of women, that a woman whose husband is living is dependent on him, and therefore incompetent to adopt independently of him; but women who have neither father, husband nor son, are independent and entitled to accept or give without any restriction: it should, however, be understood that a widow may, of her own accord, adopt, if her husband was separated from his co-heirs. The reason for this restriction appears to be that under that circumstance, the husband's estate devolves on her according to the Mitákshará, and she is practically independent of her husband's kinsmen.

**The Dattaka-Didhiti** maintains amongst others, that a widow is also competent to adopt if her husband directed her to adopt a son. He holds that the husband's assent signified in his lifetime may be effectual after his death so as to enable his widow to affiliate.

**Summary of the different views of commentators.**—The different views entertained by the commentators that have dealt with the subject of woman's capacity to adopt, fall within what are set forth in one or other of the works cited above. The different opinions expressed in them, and representing the various doctrines prevalent on the subject may be summarized thus:—

1st. A woman is absolutely incompetent to adopt a son; she may only associate with her husband when he adopts.

2nd. A woman is competent to adopt with her husband's assent, only when he is living.

3rd. A widow also can adopt with her deceased husband's assent given before his death.

4th. A widow can adopt with the assent of her deceased husband's kinsmen.

5th. A widow can adopt without the assent of her husband or of his kinsmen, when her husband was separate.

**In what character does a woman adopt, when adoption is competent to her?** Owing to the diversity of the opinions entertained by different authors and to the inconsistency of the doctrines adopted by some Schools, it has become somewhat difficult to determine the character in which an adoption is made by a woman when she is permitted to do so. The question that arises for consideration is, Does a woman adopt merely as the delegate or representative of her husband, she being as it were the agent or instrument through which the husband acts; or, does a woman adopt in her own right, but require the assent of her husband or of his kinsmen after his death, in consequence of her want of legal discretion, which is deducible from the lifelong status of pupilage or tutelage assigned to her by the Hindu law? Upon a review of all that has been said by the Sanskrit commentators whilst discussing woman's capacity to adopt, the balance of authorities appears to be in favour of the latter alternative. Those that maintain widow's competency to adopt with the assent of her lord-

band's kinsmen, rest the doctrine on the theory of women's dependence and guardianship as provided by Manu and Yájnavalkya. True it is that a woman is declared by the commentators to be incompetent to adopt, if her husband has a begotten son by another wife; but that rule is deduced from the special text of Manu, relating to co-wives, according to which the spiritual purposes of all of them are served by that son,—and from the incapacity of the husband for giving his assent, but not from any supposed general incompetency of women to adopt. Those authors also, that put a strict construction upon the expression "husband's assent" in Vasishtha's text, and refuse to take it as illustrative, rest their doctrine not upon absolute incapacity, but upon the selfsame principle of want of independence in women, with this difference that they contend that, for the purpose of having a son by adoption, the legal discretion which a woman wants can be supplied by the *auctoritas* of her husband alone. It may, doubtless, be urged that when the sanction of the husband is absolutely requisite for an adoption by a woman, does it not follow that it is the act of the husband and not of the wife? There cannot be any doubt that it is practically so, but yet it may be of a different character in theory, and attended with consequences that are not otherwise possible. The legal guardian of a minor may, for several purposes, supply by his *auctoritas* the discretion which a minor wants; for instance, a minor may, according to some systems of law, contract a marriage with the consent of his legal guardian. A Hindu female's status resembles that of a minor: she is, in the eye of Hindu law, a lifelong minor. You cannot, however, expect to find one common principle underlying the divergent views entertained by the different commentators. For, if you confine your attention to the views of Váchaspati Misra and Nanda Pandita, you may, no doubt come to the conclusion that a woman, if permitted to adopt at all, acts as an agent of her husband. But it should be borne in mind that the former denies woman's right to adopt, and the latter declares, that adoption is incompetent to widows. Jagannath also says that a valid adoption by a wife is the act of the husband, though at the same time he admits a man's power to adopt a son, when another begotten or adopted son is in existence; so a man having more wives than one may, according to his theory, adopt a son to each of them. The other authors whose views are already known to you appear to recognize a woman's capacity to adopt in her own right. It may, no doubt, be urged that for spiritual purposes, a widow need not adopt, because Manu declares[1] that a sonless widow may ascend to heaven, t[illegible]gh she may be destitute of male issue. But that text is intended, as I have a[illegible]ady told you, to prohibit a widow to have *a son of her body*, and not to adopt o[illegible] for temporal or spiritual purposes. But that text of Manu cannot prevent t[illegible] doption of two or more sons by the wives of the same husband during his

[1] Manu V, 160.

life; for although widows leading a life of austerities may not require a son according to that passage of Manu, it cannot do away with the necessity of a son for a woman predeceasing her husband. And it should be observed that there is no authority in Hindu law, for the proposition that a son adopted by the husband in conjunction with one wife, can be a son to his other wives either in a spiritual or a temporal point of view.

**Adoption by unmarried females** is not alluded to by any of the commentators; but if adoption be competent to women in their own right, spinsters might, like bachelors, adopt sons, with the consent of their father or of his relations according to the guardianship theory. Maiden daughters could, according to ancient law, have a *kánína* son; and if unmarried women could be mothers of one description of secondary son, it would seem from analogy that they might have also a son by adoption. Jagannátha refers to this ancient practice, but says it is forbidden by the Áditya-Purána, in the present age; and when he as well as other commentators who maintain the necessity of the husband's assent for an adoption by a woman, base their conclusion upon the theory that a woman cannot have a son apart from her husband, it is clear that in those Schools that have adopted this view, a maiden is incompetent to adopt. There may be some doubt on this point in those Schools which maintain the guardianship theory; but as Hindu females are generally disposed of in marriage before puberty, adoption by unmarried damsels is more a theoretical than a practical question, and the spirit of the law, as explained by the special treatises, is clearly against it.

But it should be observed in this connection that the above observation applies to females that belong to the Hindu community in its strictest sense. There is, however, a class or community of females, recognized by Hindu law, which lies beyond the pale of Hindu society and forms but a fringe of it, and which may be joined by any woman expelled by her relations for her misconduct. I mean the dancing girls who are characterized as *svairiní* or independent, and are not amenable to the rules based on the principle of subjection of women. These fallen women profess Hinduism and they often adopt daughters. If their capacity to adopt daughters be recognized, there is no reason why women in Hindu society should be precluded from adopting sons.

**Adoption competent to married women and widows.**—But let us now confine our attention to the commentaries, according to which women who have or had a husband, are only capable of adopting sons, subject to the c- li- tions imposed upon them for exercising the power of adoption. When a wo an is the only wife of her husband, there does scarcely arise any difficulty, as th of them join in adopting the same son, except in rare cases, in which, owin to serious disagreement between the husband and the wife, the husband r ne adopts against the wife's will, or without permitting her to associate with m

in the ceremony of adoption. In such cases the son adopted by the husband cannot be a son to the wife except in a tertiary sense, for although a son of the husband's body has been pronounced to become a secondary son to his wives other than the son's mother, for religious purposes, yet there is no suggestion anywhere that a son adopted by the husband without the concurrence of his wife becomes her son, for any purpose. An inference may, no doubt, be drawn from Nanda Pandita's observations[1] concerning the wife's assent to an adoption by her husband, that a son affiliated by the husband becomes also adopted to the wife. But it appears that the affiliation to her is merely nominal, just as her co-ownership[2] with the husband in any property belonging to him. To be a son to her for legal and religious purposes, it appears to be necessary that she should join in the ceremony of accepting the boy adopted by the husband,[3] for in the absence of her acceptance, she cannot be called "adoptive mother." Besides, it should be borne in mind that the authority of the Dattaka Mimansa, in this respect is not respected except in the Mithila School.

If the theory of adoption by a woman be, that she adopts in her own right, but requires the assent of her legal guardian for the time being, then in the above case, the wife may adopt another son notwithstanding the adoption of a son by the husband alone, provided the latter gives his assent. For the same reason, simultaneous or successive adoption by two or more co-wives or co-widows, of two or more sons, one by each, would be perfectly valid, when there is the requisite assent therefor.

**Different Schools on the condition for woman's capacity for adoption.**—I have already placed before you the divers views put forward by the different commentators, with respect to women's capacity for adoption. It is impossible to deduce one common principle from the different doctrines which are not reconcileable with one another. The character in which a woman is competent to adopt would therefore necessarily be different in the different Schools. This much, however, is common to all the Schools that a woman may adopt during her husband's life, only with his assent, except when he is an idiot or insane: in which case an adoption may be competent to her with the husband's kinsmen's assent in those Schools which have adopted that doctrine.

**The Mithila School.**—The modern usage in Mithilá, with respect to woman's power of adoption, appears to accord with the doctrine maintained by Nanda Pandita in the Dattaka-Mimánsá.[4] There a widow cannot adopt in the attaka form at all,[5] in spite of the deceased husband's sanction for the same. ıe principle upon which this doctrine rests is explained in the Dattaka-Mímánsá,

[1] Dat. Mím. 1, 22.

[2] Viramitrodaya, p. 165.

[3] Dat. Mim. 6, 50.

[4] Dat. Mim. 1, 16 and 21.

[5] Dat. Mim. 1, 16; Vivada-Chintamani, p. 74; W. Macnaghten's Hindu Law, vol. 1, pp. 95, ∞: *Jai Ram Dhami* v. *Musan Dhami*, 5 Bengal Select Reports, p. 8, (new edition).

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guardian of his widow, who must therefore adopt with that relation's assent. It is difficult to explain how these irreconcileable doctrines have come to be adopted in these Schools. This grave anomaly seems to be due to the modern development of law.

It may be observed here that the doctrine of widow's capacity to adopt with the assent of the husband's relations only, appears to accord best with the Mitákshará doctrine of inheritance by survivorship in a joint family. For if the adoption by a widow be made with the concurrence of the surviving members of a joint family, the question of vesting and divesting does not arise, the boy being introduced into the family by the assent of its members, he becomes a member of the family corporation by its own act conferring a right to the family estate. But adoption by the permission of the deceased husband will have the effect of divesting the undivided coparcenary interest of the adoptive father, which must on his death have passed by survivorship to the other members of the family.

**Adoption by widows without authority peculiar to the Bombay School and to the Jainas.**—The Bombay School recognizes the competency of a widow to adopt a son without any authority from her husband or his relations, if the husband was not a member of a joint family, or was separated from his coparceners. Consistently with the other doctrines respecting the power of widows to adopt, that are prevalent in that School, this special privilege enjoyed by widows there, may be explained upon the theory that women have the right to adopt, but as the widows under the circumstances, are entitled to inherit their husband's estate to the exclusion of her husband's relations, they become necessarily independent of them, and accordingly do not require their assent for adoption. This usage may also be explained upon the supposition of the husband's assent being presumed from the absence of express prohibition; and this doctrine derives some support from an observation made by the author of the Víramitrodaya[1] in the course of refuting the position that a widow cannot adopt at all if her husband died without giving permission. But the author's own view on the matter, is, as we have already seen, that a widow must have the consent of the husband's kinsmen.

This Bombay doctrine of the independence of widows inheriting their husband's estate, in adopting sons according to their pleasure, appears to have some connection with the nature and character of the 'widow's estate' in property inited from the husband. The text of Kátyáyana,[2] which is the foundation of nomalous estate well-known as the Hindu widow's estate, is not cited by ommentators of that School, excepting Mitra Misra. But his interpretation ext is different from that put upon it by Jímútaváhana, and he does,

[1] mitrodaya, pp. 115-116.

[2] Dayabhaga, XI, 1, 56.

according to which a woman in adopting a child acts simply as her husband's agent in the legal sense. And as an agent's authority is revoked by the death of the principal, so is the husband's authority to his wife to adopt, determined on his death; a widow therefore cannot adopt.

**The Bengal School** does not appear to admit the doctrine of agency, for it recognizes the right of widows to affiliate sons with the deceased husband's permission, signified before his death. In this School women appear to possess[1] the capacity to adopt in their own right, but the husband's assent is absolutely necessary, by reason of Vasishtha's text, whether it be taken to supply their supposed want of discretion, or to discourage the idea of a woman having a son apart from her husband. The sufficiency of the husband's kinsmen's assent is not admitted by this School.

**The Benares School** is, according to the modern view, the same in this respect as the Bengal School. Women may adopt with the husband's permission either in his life or after his death. The Víramitrodaya, however, maintains, as we have already seen, that widows may adopt with the assent of the husband's kinsmen. But this view was not accepted by the courts of justice, inasmuch as they were advised by Pandits that, with respect to the law of adoption, the Víramitrodaya is outweighed by the superior authority of the Dattaka-Mímánsá which repudiates the doctrine of guardianship of women for adoption.[2] But it did not occur to the Pandits that if Nanda Pandita's view be accepted as binding in the Benares School, there could be no adoption by a widow even with her deceased husband's permission. The law, however, has developed in this way, and it is now settled that a widow in that School can affiliate only with her deceased husband's authority.

**The Madras, Bombay and Punjab Schools** recognize a widow's competency to adopt, either with the assent of her deceased husband or with that of his kinsmen. These two doctrines appear to be inconsistent with each other. For, those commentators that maintain a widow's power to adopt with the assent of her husband's kinsmen, explain the expression "husband's assent" required by Vasishtha for an adoption by a woman, to intend the assent of her legal guardian, and in support of this interpretation, they rely upon the passages of Manu and Yájnavalkya, ordaining the dependent state of women and their guardianship. According to this doctrine, the husband's assent is sufficient for an adoption during his life when he is the wife's guardian; but a deceased husband's assent expressed in his lifetime, cannot, according to that theory, be effectual after his death so as to authorize his widow to adopt, for his guardianship ceases on his death, and some other relation becomes

[1] Dattaka-Chandriká, 1, 7.

[2] *Raja Shumshere Mull v. Ranee Dilraj Konwur*, 2 Bengal Sel. Rep., 216; *Jai Ram Dass v. Musan Dhami*, 5 Bengal Sel. Rep., 3.

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[1] Víramitrodaya, pp. 115-116.

[2] Dayabhaga, XI, 1, 56.

besides, uphold, upon the principle of *factum valet*, alienations made by a widow for religious purposes.[1] Accordingly, as the affiliation of a son is most beneficial to the husband's soul, a widow may be permitted to make it in the absence of a corrupt motive.

**Modern view of woman's capacity to adopt.**—According to the view now prevailing adoption is considered incompetent to a woman in her own right; she is supposed to act as a mere delegate or representative of her husband, when she is permitted to make a valid adoption; in fact she is deemed to be the agent or instrument through whom the husband acts. The capacity of a woman to adopt, in this view, resembles a power of appointment given by the husband to his wife. This theory appears to be deduced solely from Nanda Pandita's opinion on the character of an adoption by a woman,[2] but the doctrine pronounced by him is nowhere respected except in Mithila. The principle of guardianship underlying the adoption by widows with the assent of husband's kinsmen, is entirely lost sight of. And the disregard of this principle has led to the recognition of a widow's competency to adopt with the deceased husband's assent in those Schools which recognize the sufficiency of kinsmen's assent for enabling a widow to adopt. The inconsistency of the view according to which the assent either of the deceased husband or of his kinsmen is sufficient to empower the widow to take a son in adoption, does not appear to have suggested itself, in consequence of the real principle upon which the sufficiency of the deceased husband's kinsman's assent is founded, not having been taken into consideration. On the contrary the kinsmen's assent is deemed to be substitutive of that of the husband.

The sufficiency of the kinsmen's assent seems to be inexplicable, upon the theory that a woman is incompetent to adopt in her own right, and that the assent of the husband constitutes the power under which the wife as the donee of that power, may affiliate a son, in right of her husband. It is difficult to reconcile the doctrine of a woman being merely her husband's agent or delegate in the act of adoption, with the theory that the power of adoption may be conferred by the husband's kinsmen, if he dies without giving any. The Madras High Court once entertained an opinion that the doctrine of kinsmen's assent is founded upon the old principle of actual begetting by a brother or other sapinda, of a son on a widow through appointment to raise issue.[3] But this view was disapproved by the Judicial Committee in appeal, and it would rather negative the doctrine of a woman's power of adoption being derived from her husband.

The power of adoption, possessed in the Bombay School by widows wh

[1] Víramitrodaya, pp. 138—141. [2] Dat. Mím. 1, 21.

[3] *The Collector of Madura* v. *M. Ramalinga Sethupati*, 2 Mad. H. C. R., 206, (230.)

husbands were not members of joint families, without the assent of their deceased husband or their kinsmen, is contradictory to the theory that a woman has no right to adopt but acts as an agent of her husband in the matter of adoption. Mr. Mayne appears to perceive the anomaly and offers the following ingenious explanation:—"The reason probably is, that she is looked upon, not merely as his agent, but as the surviving half of himself, and, therefore, exercising an independent discretion, which can neither be supplied, nor controlled, by any one else. It is no doubt upon the same principle, that an express authority, or even direction, by a husband to his widow to adopt is for all legal purposes, absolutely non-existent until it is acted upon. She cannot be compelled to act upon it unless, and until, she chooses, to do so."[1]

With respect to the widow's right to adopt the Judicial Committee observes,—"All the schools accept as authoritative the text of Vasishtha, which says:—'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha and Koustoobha treatises, which govern the Mahratta School, explains the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all those writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband."[2]

The law relating to adoption by females has developed upon the theory that a woman acts under a delegated authority of her husband,[3] that she can adopt to no one but her husband,[4] and that the wife is the only person to whom the husband may delegate the power of adoption. However anomalous the doctrine might appear, it has moulded the growth of this branch of the law, and forms the foundation of several other doctrines that have sprung up in connection with the same subject; and it would be now too late to contend that the doctrine cannot be legitimately deduced from the commentaries, or that it the result of a hasty generalization.

[1] Mayne's Hindu Law, § 107.

[2] *The Collector of Madura* v. *Muttu Ramalinga Sathupathy*, 12 Moore's I. A., 435; 10 W. R., C., 17.

[3] *Gopee Lall* v. *Mr. Sree Chundraboles Buhoojee*, 19 W. R., 12.

[4] *Chowdhry Pudum Sing* v. *Koer Oddey Sing* 12 W. R., P. C., 1; 2 B. L. R., P. C., 101; 12 oore's I. A., 356.

Let us now proceed to examine the present law of adoption by widows. Adoption by females during coverture is almost the same in all the schools, and excepting the proposition that adoption is not competent to each of the co-wives of the same man, the modern law on the subject seems to be practically the same as we find it in the Sanskrit works. I shall in the first instance consider the law of the Bengal School, for the Bengal doctrine recognizing the capacity of widows to adopt with their deceased husband's assent has now been adopted by all the Schools, although it seems to be inconsistent, as I have already told you, with the guardianship theory prevailing in some Schools. In fact the Bengal law has made considerable inroads upon the Mitákshará Schools,—a result attributable to the fact that most of the European authorities on Hindu law flourished in Bengal.

**Bengal School,—husband's assent is regarded as power.**—The Bengal School requires that the husband's assent is absolutely necessary for a valid adoption by his wife or widow: and according to it, the want of the husband's assent is a deficiency which cannot be supplied by the assent of his kinsmen, apparently upon the principle that in the matter of having a son, begotten or adopted, a woman must be dependent on her husband alone, and upon no other person. Agreeably to the modern theory of the purpose of the husband's assent it has come to be regarded as a power of appointment conferred by the husband upon his wife, and several rules relating to powers in English law have been extended to this power of adoption. It may be observed here that a power conferred by a deceased husband, intending it to be carried into effect after his death by his widow bears a close resemblance to a will or testamentary disposition of property, which was unknown to Hindu law, but has been engrafted upon it, more especially in Bengal. And the modern view of the nature of an authority to adopt, has to a great extent, been moulded by the recognition of the testamentary power of the Hindus of Bengal. Although an authority to adopt is declared to be different from a testamentary disposition of property[1] and an adopted son is held to take by descent and not by devise, yet there are some doctrines that are quite inexplicable except upon the supposition that the donor of the power to adopt is possessed of testamentary power.

**Conditional authority by husband having a son in existence.**—The modern doctrine that a man having a son bogotten or adopted is competent to grant a conditional authority to his wife to adopt in the event of the death of that son, appears to be an incident of the testamentary power. There is no authority in Hindu law to support the proposition that a man having a bego son in existence at the time of his death may authorize his widow to adop son in the contingency of the existing son's death without male issue; all t

[1] *Bhoobunmoyee Debi* v. *Ramkishore Acharjee*, 10 Moore's I. A., 279; 3 W. R., P. C., 15.

a man is required by the Shasters to do in order to qualify himself to ascend to the blissful regions of heaven, is, to leave behind him a son at the time of his death. The Víramitrodaya,[1] on the contrary, lays down expressly, that a man having a begotten son by one wife cannot possibly give permission to another wife to whom no son has been born, to adopt a son. Besides, it seems to be somewhat inconsistent that a man who is incompetent to do an act himself, should have the power to authorize another to do it; and in one case[2] it was held that such authority to adopt is invalid.

It appears, however, to be now settled that a widow who has received from her deceased husband an express power to adopt a son in the event of his natural-born or adopted son dying without leaving male issue, may, on the happening of that event, make a valid adoption.[3] Similarly, when a man gives to his widow permission to adopt two or more sons, in succession, it has been held that if the son first adopted by her dies, she is competent to adopt another son in pursuance of the authority.[4]

**Restrictions annexed by the husband to the exercise of the power.**—The husband being the donor of the power under which a widow may adopt, he is regarded to possess the right of imposing restrictions and conditions, subject to which the widow is to exercise the power. The Hindu law, however, is entirely silent upon the point, the theory propounded by the commentators being that the husband may either give or withhold his assent. But at the same time it is clear that when one person's assent is necessary for an act to be done by another, it follows that the former must have the power of qualifying his assent by restrictions and limitations. As a woman's capacity to adopt is now regarded to be derived from the husband, he is fully entitled to give directions regulating the exercise of the power, as regards the events on which it is made contingent, and as regards the choice of the boy to be adopted.

**Power of adoption to be exercised with the consent of a third party.**—Sometimes a man may, while giving his wife authority to adopt, direct that the adoption, or the selection of the boy, should be made with the consent of his executor or any other person. The rule of the English law of powers is,—"If a power is given, to be executed with the consent of one or more persons, and that one or any one of the others, dies, the power is gone."[5] The tendency

[1] Víramitrodaya, pp. 115-116.

[2] *Pootumall* v. *Goolam Russool*, Madras Sudder D. Reports for 1854, p. 47.

[3] *Musst. Solukhna* v. *Ramdolal Pande*, 1 Bengal Sel. Reports, 434 (324); *Bhoobunmoyi Dimkissor Acharjee*, 10 Moore I. A., 279; 3 W. R., P. C., 15; *Bykant Monee Roy v. Kisto Soondaree Roy*, 7 W. R., 392; *Vellanki Venkata* v. *Venkata Rama*, I. L. R., 1 Mad., 174.

[4] *Ram Soondar Sing* v. *Surbanu Dassee*, 22 W. R., 121.

[5] Farwell on Power, page 117.

of women, that a woman whose husband is living is dependent on him, and therefore incompetent to adopt independently of him; but women who have neither father, husband nor son, are independent and entitled to accept or give without any restriction: it should, however, be understood that a widow may, of her own accord, adopt, if her husband was separated from his co-heirs. The reason for this restriction appears to be that under that circumstance, the husband's estate devolves on her according to the Mitákshará, and she is practically independent of her husband's kinsmen.

**The Dattaka-Dídhiti** maintains amongst others, that a widow is also competent to adopt if her husband directed her to adopt a son. He holds that the husband's assent signified in his lifetime may be effectual after his death so as to enable his widow to affiliate.

**Summary of the different views of commentators.**—The different views entertained by the commentators that have dealt with the subject of woman's capacity to adopt, fall within what are set forth in one or other of the works cited above. The different opinions expressed in them, and representing the various doctrines prevalent on the subject may be summarized thus:—

1st. A woman is absolutely incompetent to adopt a son; she may only associate with her husband when he adopts.

2nd. A woman is competent to adopt with her husband's assent, only when he is living.

3rd. A widow also can adopt with her deceased husband's assent given before his death.

4th. A widow can adopt with the assent of her deceased husband's kinsmen.

5th. A widow can adopt without the assent of her husband or of his kinsmen, when her husband was separate.

**In what character does a woman adopt, when adoption is competent to her?** Owing to the diversity of the opinions entertained by different authors and to the inconsistency of the doctrines adopted by some Schools, it has become somewhat difficult to determine the character in which an adoption is made by a woman when she is permitted to do so. The question that arises for consideration is, Does a woman adopt merely as the delegate or representative of her husband, she being as it were the agent or instrument through which the husband acts; or, does a woman adopt in her own right, but require the assent of her husband or of his kinsmen after his death, in consequence of her want of legal discretion, which is deducible from the lifelong status of pupilage or tutelage assigned to her by the Hindu law? Upon a review of all that has been said by the Sanskrit commentators whilst discussing woman's capacity to adopt, the balance of authorities appears to be in favour of the latter alternative. Those that maintain widow's competency to adopt with the assent of her hus-

band's kinsmen, rest the doctrine on the theory of women's dependence and guardianship as provided by Manu and Yájnavalkya. True it is that a woman is declared by the commentators to be incompetent to adopt, if her husband has a begotten son by another wife; but that rule is deduced from the special text of Manu, relating to co-wives, according to which the spiritual purposes of all of them are served by that son,—and from the incapacity of the husband for giving his assent, but not from any supposed general incompetency of women to adopt. Those authors also, that put a strict construction upon the expression "husband's assent" in Vasishtha's text, and refuse to take it as illustrative, rest their doctrine not upon absolute incapacity, but upon the selfsame principle of want of independence in women, with this difference that they contend that, for the purpose of having a son by adoption, the legal discretion which a woman wants can be supplied by the *auctoritas* of her husband alone. It may, doubtless, be urged that when the sanction of the husband is absolutely requisite for an adoption by a woman, does it not follow that it is the act of the husband and not of the wife? There cannot be any doubt that it is practically so, but yet it may be of a different character in theory, and attended with consequences that are not otherwise possible. The legal guardian of a minor may, for several purposes, supply by his *auctoritas* the discretion which a minor wants; for instance, a minor may, according to some systems of law, contract a marriage with the consent of his legal guardian. A Hindu female's status resembles that of a minor: she is, in the eye of Hindu law, a lifelong minor. You cannot, however, expect to find one common principle underlying the divergent views entertained by the different commentators. For, if you confine your attention to the views of Váchaspati Misra and Nanda Pandita, you may, no doubt come to the conclusion that a woman, if permitted to adopt at all, acts as an agent of her husband. But it should be borne in mind that the former denies woman's right to adopt, and the latter declares, that adoption is incompetent to widows. Jagannath also says that a valid adoption by a wife is the act of the husband, though at the same time he admits a man's power to adopt a son, when another begotten or adopted son is in existence; so a man having more wives than one may, according to his theory, adopt a son to each of them. The other authors whose views are already known to you appear to recognize a woman's capacity to adopt in her own right. It may, no doubt, be urged that for spiritual purposes, a widow need not adopt, because Manu declares[1] that a sonless widow may ascend to heaven, t[h]ugh she may be destitute of male issue. But that text is intended, as I have a[l]ady told you, to prohibit a widow to have *a son of her body*, and not to adopt c[o] for temporal or spiritual purposes. But that text of Manu cannot prevent t[h]e adoption of two or more sons by the wives of the same husband during his

[1] Manu V, 160.

life; for although widows leading a life of austerities may not require a son according to that passage of Manu, it cannot do away with the necessity of a son for a woman predeceasing her husband. And it should be observed that there is no authority in Hindu law, for the proposition that a son adopted by the husband in conjunction with one wife, can be a son to his other wives either in a spiritual or a temporal point of view.

**Adoption by unmarried females** is not alluded to by any of the commentators; but if adoption be competent to women in their own right, spinsters might, like bachelors, adopt sons, with the consent of their father or of his relations according to the guardianship theory. Maiden daughters could, according to ancient law, have a *kánína* son; and if unmarried women could be mothers of one description of secondary son, it would seem from analogy that they might have also a son by adoption. Jagannátha refers to this ancient practice, but says it is forbidden by the Áditya-Purána, in the present age; and when he as well as other commentators who maintain the necessity of the husband's assent for an adoption by a woman, base their conclusion upon the theory that a woman cannot have a son apart from her husband, it is clear that in those Schools that have adopted this view, a maiden is incompetent to adopt. There may be some doubt on this point in those Schools which maintain the guardianship theory; but as Hindu females are generally disposed of in marriage before puberty, adoption by unmarried damsels is more a theoretical than a practical question, and the spirit of the law, as explained by the special treatises, is clearly against it.

But it should be observed in this connection that the above observation applies to females that belong to the Hindu community in its strictest sense. There is, however, a class or community of females, recognized by Hindu law, which lies beyond the pale of Hindu society and forms but a fringe of it, and which may be joined by any woman expelled by her relations for her misconduct. I mean the dancing girls who are characterized as *svairiní* or independent, and are not amenable to the rules based on the principle of subjection of women. These fallen women profess Hinduism and they often adopt daughters. If their capacity to adopt daughters be recognized, there is no reason why women in Hindu society should be precluded from adopting sons.

**Adoption competent to married women and widows.**—But let us now confine our attention to the commentaries, according to which women who have or had a husband, are only capable of adopting sons, subject to the co li- tions imposed upon them for exercising the power of adoption. When a wo an is the only wife of her husband, there does scarcely arise any difficulty, as b th of them join in adopting the same son, except in rare cases, in which, owin to serious disagreement between the husband and the wife, the husband al ne adopts against the wife's will, or without permitting her to associate with m

in the ceremony of adoption. In such cases the son adopted by the husband cannot be a son to the wife except in a tertiary sense, for although a son of the husband's body has been pronounced to become a secondary son to his wives other than the son's mother, for religious purposes, yet there is no suggestion anywhere that a son adopted by the husband without the concurrence of his wife becomes her son, for any purpose. An inference may, no doubt, be drawn from Nanda Pandita's observations[1] concerning the wife's assent to an adoption by her husband, that a son affiliated by the husband becomes also adopted to the wife. But it appears that the affiliation to her is merely nominal, just as her co-ownership[2] with the husband in any property belonging to him. To be a son to her for legal and religious purposes, it appears to be necessary that she should join in the ceremony of accepting the boy adopted by the husband,[3] for in the absence of her acceptance, she cannot be called "adoptive mother." Besides, it should be borne in mind that the authority of the Dattaka Mimansa, in this respect is not respected except in the Mithila School.

If the theory of adoption by a woman be, that she adopts in her own right, but requires the assent of her legal guardian for the time being, then in the above case, the wife may adopt another son notwithstanding the adoption of a son by the husband alone, provided the latter gives his assent. For the same reason, simultaneous or successive adoption by two or more co-wives or co-widows, of two or more sons, one by each, would be perfectly valid, when there is the requisite assent therefor.

**Different Schools on the condition for woman's capacity for adoption.**—I have already placed before you the divers views put forward by the different commentators, with respect to women's capacity for adoption. It is impossible to deduce one common principle from the different doctrines which are not reconcileable with one another. The character in which a woman is competent to adopt would therefore necessarily be different in the different Schools. This much, however, is common to all the Schools that a woman may adopt during her husband's life, only with his assent, except when he is an idiot or insane: in which case an adoption may be competent to her with the husband's kinsmen's assent in those Schools which have adopted that doctrine.

**The Mithila School.**—The modern usage in Mithilá, with respect to woman's power of adoption, appears to accord with the doctrine maintained by Nanda Pandita in the Dattaka-Mimánsá.[4] There a widow cannot adopt in the Dattaka form at all,[5] in spite of the deceased husband's sanction for the same. The principle upon which this doctrine rests is explained in the Dattaka-Mímánsá,

[1] Dat. Mím. 1, 22.
[2] Víramitrodaya, p. 165.
[3] Dat. Mim. 6, 50.
[4] Dat. Mim. 1, 16 and 21.
[5] Dat. Mim. 1, 16; Vivada-Chintamani, p. 74; W. Macnaghten's Hindu Law, vol. 1, pp. 95, : *Jai Ram Dhami* v. *Musan Dhami*, 5 Bengal Select Reports, p. 8, (new edition).

according to which a woman in adopting a child acts simply as her husband's agent in the legal sense. And as an agent's authority is revoked by the death of the principal, so is the husband's authority to his wife to adopt, determined on his death; a widow therefore cannot adopt.

**The Bengal School** does not appear to admit the doctrine of agency, for it recognizes the right of widows to affiliate sons with the deceased husband's permission, signified before his death. In this School women appear to possess[1] the capacity to adopt in their own right, but the husband's assent is absolutely necessary, by reason of Vasishtha's text, whether it be taken to supply their supposed want of discretion, or to discourage the idea of a woman having a son apart from her husband. The sufficiency of the husband's kinsmen's assent is not admitted by this School.

**The Benares School** is, according to the modern view, the same in this respect as the Bengal School. Women may adopt with the husband's permission either in his life or after his death. The Víramitrodaya, however, maintains, as we have already seen, that widows may adopt with the assent of the husband's kinsmen. But this view was not accepted by the courts of justice, inasmuch as they were advised by Pandits that, with respect to the law of adoption, the Víramitrodaya is outweighed by the superior authority of the Dattaka-Mímánsá which repudiates the doctrine of guardianship of women for adoption.[2] But it did not occur to the Pandits that if Nanda Pandita's view be accepted as binding in the Benares School, there could be no adoption by a widow even with her deceased husband's permission. The law, however, has developed in this way, and it is now settled that a widow in that School can affiliate only with her deceased husband's authority.

**The Madras, Bombay and Punjab Schools** recognize a widow's competency to adopt, either with the assent of her deceased husband or with that of his kinsmen. These two doctrines appear to be inconsistent with each other. For, those commentators that maintain a widow's power to adopt with the assent of her husband's kinsmen, explain the expression "husband's assent" required by Vasishtha for an adoption by a woman, to intend the assent of her legal guardian, and in support of this interpretation, they rely upon the passages of Manu and Yájnavalkya, ordaining the dependent state of women and their guardianship. According to this doctrine, the husband's assent is sufficient for an adoption during his life when he is the wife's guardian; but a deceased husband's assent expressed in his lifetime, cannot, according to th theory, be effectual after his death so as to authorize his widow to adopt, f his guardianship ceases on his death, and some other relation becomes t

[1] Dattaka-Chandriká, 1, 7.

[2] *Raja Shumshere Mull v. Ranee Dilraj Konwur*, 2 Bengal Sel. Rep., 216; *Jai Ram Dha v. Musan Dhami*, 5 Bengal Sel. Rep., 3.

guardian of his widow, who must therefore adopt with that relation's assent. It is difficult to explain how these irreconcileable doctrines have come to be adopted in these Schools. This grave anomaly seems to be due to the modern development of law.

It may be observed here that the doctrine of widow's capacity to adopt with the assent of the husband's relations only, appears to accord best with the Mitákshará doctrine of inheritance by survivorship in a joint family. For if the adoption by a widow be made with the concurrence of the surviving members of a joint family, the question of vesting and divesting does not arise, the boy being introduced into the family by the assent of its members, he becomes a member of the family corporation by its own act conferring a right to the family estate. But adoption by the permission of the deceased husband will have the effect of divesting the undivided coparcenary interest of the adoptive father, which must on his death have passed by survivorship to the other members of the family.

**Adoption by widows without authority peculiar to the Bombay School and to the Jainas.**—The Bombay School recognizes the competency of a widow to adopt a son without any authority from her husband or his relations, if the husband was not a member of a joint family, or was separated from his coparceners. Consistently with the other doctrines respecting the power of widows to adopt, that are prevalent in that School, this special privilege enjoyed by widows there, may be explained upon the theory that women have the right to adopt, but as the widows under the circumstances, are entitled to inherit their husband's estate to the exclusion of her husband's relations, they become necessarily independent of them, and accordingly do not require their assent for adoption. This usage may also be explained upon the supposition of the husband's assent being presumed from the absence of express prohibition; and this doctrine derives some support from an observation made by the author of the Víramitrodaya[1] in the course of refuting the position that a widow cannot adopt at all if her husband died without giving permission. But the author's own view on the matter, is, as we have already seen, that a widow must have the consent of the husband's kinsmen.

This Bombay doctrine of the independence of widows inheriting their husband's estate, in adopting sons according to their pleasure, appears to have some connection with the nature and character of the 'widow's estate' in property inherited from the husband. The text of Kátyáyana,[2] which is the foundation of the anomalous estate well-known as the Hindu widow's estate, is not cited by the commentators of that School, excepting Mitra Misra. But his interpretation that text is different from that put upon it by Jímútaváhana, and he does,

[1] Víramitrodaya, pp. 115-116.

[2] Dayabhaga, XI, 1, 56.

*muttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *sradh* and other rites, and for the Sheba (service) of the gods and for the succession to the zemindary and other property; on which, if the adopted son be non-existent which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that Dattaka (adopted) son shall be entitled to perform your and my *sradh* &c., and that of our ancestors, and also to succeed to the property. To this I execute this *Onumuttee puttro*."

With respect to the construction of this document the Lords of the Judicial Committee observe as follows:—"The first question which arises is as to the construction of this instrument. It seems to have been considered by the two Judges of the Sudder Court, who decided in favour of the respondent (certainly by one of them,) that the document was to be regarded as a Will, and as containing a limitation, on failure of male issue of the testator in the lifetime of *Chundrabullee Debia*, of the estate of the testator, to a son to be adopted by *Chundrabullee Debia*, as a *persona designata;* and one of the Judges, in a very elaborate argument, refers to Mr. *Fearne's* celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of *Bengal;* but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of *England.* Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing as far as possible from that which prevails amongst Hindoos in *India.*

"But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the lifetime of the maker; it contains no word of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by

adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them."

Their Lordships, however, expressed no opinion as to the power of Gour Kishore to have made, by devise of his estates, the disposition in favour of a son to be adopted, insisted on by Ram Kishore, as their Lordships found no devise in the instrument. The result was that Ram Kishore was declared not entitled to the property, the estate of the widow of Bhowanee Kishore being not liable to be divested. The precise ground upon which this decision was based has been the subject of discussion in later cases, as there are observations in the judgment, from which several different principles may be inferred, any one of which may support the decree.

**An adoption then made is invalid.**—The Judicial Committee did not, however, make any express declaration with respect to the validity or otherwise of Ram Kishore's adoption; and that question arose after the death of Bhoobun Moyee and Chundrabullee, when Ram Kishore got into possession of the estate, and was sued for its recovery by a more distant relation. It was beyond all dispute that if Ram Kishore's adoption were valid he would be entitled to take the estate after the death of the widow and the mother of Bhowanee as his brother by adoption; and from one part of the judgment it might be contended that the Privy Council rested their decision upon the principle that Ram Kishore being a brother by adoption to Bhowanee, the last full owner of the property could not take in preference to his widow, far less could her vested estate be defeated and divested by his subsequent adoption. On the other hand it might as well be maintained that the adoption was by necessary implication declared to be invalid. Because Lord Kingsdown at one part of the judgment observes, "that at the time when Chundrabullee Debia professed to exercise it, the power was incapable of execution"; and in a later part his Lordship referring to the *anumati-patra* of Gour Kishore observes,—"it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowanee had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the lifetime of *Chundrabullee Debia*. It could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son according to the largest construction of them, would have been satisfied. I whatever may have been the intention, would the law allow it to b effected? We rather understand the judges below to have been of c ion that if Bhowanee Kishore had left a son, or if a son had been law- f y adopted to him by his wife under a power legally conferred upon her, the l r of adoption given to *Chundrabullee Debia* would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us."

In the second case[1] that arose about the same matter, after the death of Bhoobun Moyee, the High Court held that the Privy Council had not intended to declare Ram Kishore's adoption to be invalid in law, and that it was a perfectly valid one. But on appeal to the Privy Council, their Lordships took a different view, and referring to the above passages, went on to observe,[2]—"The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower court have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowanee, the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion." This question again arose, in another shape, before the Judicial Committee in a case from Madras,[3] in which a son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father adopted a son with the assent of Sapindas. The Judicial Committee, referring to the above two cases and citing the above passage from Padma-Kumari's case observe, "Their Lordships entirely concur in that view, and they are of opinion that the adoption, with the permission of Sapindas in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made." Following the above doctrine, the Bombay High Court have held,[4] that in those cases in which a widow is otherwise competent to adopt a son without any authority either from her deceased husband or from his Sapindas, she cannot exercise the power if her husband's estate is vested in the son's widow.

I may tell you in this connection that so far as the Bengal School is concerned the above doctrine is founded on the general principle that an estate once vested cannot be divested by any subsequent event, enunciated in the Unchastity case[5] as well as in the Blindman's son's case[6]; in the former of which it was held that unchastity of a woman, subsequent to her husband's death did

[1] *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*, I. L. R. 5 Calc., 615.

[2] *Padma Kumari Debi* v. *Court of Wards*, L. R., 8 I. A., 229; I. L. R., 8 Calc., 302.

[3] *Thayammâl* v. *Venkatarámá*, I. L. R., 10 Mad., 205; affirming I. L. R., 7 Mad., 401.

[4] *Keshav Rámkrishna* v. *Govind Ganesh*, I. L. R., 9 Bom., 94.

[5] *Moniram Kolita* v. *Kerry Kolitanee*, L. R., 7 I. A., 115; I. L. R., 5 Calc., 776; 6 C. L. 322.

[6] *Kalidas Das* v. *Krishna Chundra Das*, 11 W. R., O. C., 11; 2 B. L. R., F. B., 103.

not divest the estate vested in her by inheritance from her husband; and in the second, it was ruled that the estate of a deceased person, which had passed to a collateral relation of his, to the exclusion of his son who was blind from his birth, could not be divested in favour of the blind son's begotten son born subsequently and free from any defect causing exclusion from inheritance. It should be noticed that in all the above cases relating to adoption, the estate was vested in the son's widow, that is to say, in the descending line. A distinction, however, is drawn by the Mitákshará School when the estate is vested in a collateral relation of the donor of the power of adoption, which can take place according to that school as it recognizes the doctrine of survivorship amongst the members of a joint family, whereby the widow is excluded, although she may be permitted by her deceased husband to adopt. In such a case, a collateral heir taking by survivorship may be divested by subsequent adoption, and later on I shall discuss the principle upon which that doctrine is based. But what I wish to point out here is, that there is such a difference between the Dáyabhága and the Mitákshará School with respect to several important points of doctrine, that you would introduce anomalies if you endeavour to lay down general principles governing both the Schools. In Bengal a collateral relation can, under no circumstances, inherit the estate of a person in preference to his widow unless she be excluded from inheritance by reason of personal defects; hence when an adoption is made by a widow in Bengal, the question of divesting a collateral heir does not arise, the estate of the adoptive father must vest in the widow, if the inheritance did not pass in the descending line. It is no doubt possible to conceive a case in which a person without any heir in the descending line, may have a wife who is excluded from inheritance for a cause such as congenital blindness, and may give her permission to adopt a son. Then on his death his estate must pass to a collateral heir, and the question may arise, can she make a valid adoption so as to divest the estate vested in the collateral heir? The answer, according to the Bengal doctrine, appears to be in the negative. For an adopted son cannot be in a better position than the Blindman's son above referred to, who is far superior to a fictitious son in a spiritual point of view.

It should be observed that the rule against the exercise of the power of adoption when the estate is vested in a person other than the widow, is not applicable when the authority is given by a Will containing disposition of the estate in favour of the boy to be adopted, by defeating the estate of the heir in whom it may be vested at the time of adoption.[1] For a gift to an adopted son forms an exception to the general rule that a Hindu is incapable of making a valid gift in favour of an unborn person[2]; and a Hindu is competent to make a gift subject

[1] Luckinarain Tagore's case, Sir F. Macnaghten's Considerations on Hindu Law, p. 168.

[2] *Jotendromohun Tagore* v. *Ganendromohun Tagore*, 18 W. R., 359.

to a condition of defeasance.[1] Therefore if a Hindu directs his widow to adopt by a Will, in the event of his existing son dying without male issue, and further directs that the son so adopted shall take his estate notwithstanding his other heirs, it would seem that the adoption would be valid. The above result, however, would not follow, merely because the authority is contained in a Will unless there be a gift express or necessarily implied in favour of the son to be adopted.[2]

**The power revives if the estate comes back to the widow.**—We have just seen that an adoption made by a widow in the exercise of a conditional power is invalid, if at the time the estate left by her husband is vested in the son's widow. But suppose the son's widow dies during the lifetime of the father's widow to whom the estate comes back as heir to her deceased son; and the question arises, can she *then* make a valid adoption in pursuance of the authority of her husband? This question is not free from difficulty: for, in Bhoobunmoyee's case Lord Kingsdown observes, that "*the power was incapable of execution*" when Chundrabullee sought to exercise it, and in a subsequent part of the judgment his Lordship cites apparently with approbation, the opinion of the court below that if Bhowani had left a son natural born or adopted, "*the power of Chundrabullee would have been at an end*"; and in Padma Kumari's case the Judicial Committee "consider the above decision to be that upon the vesting of the estate in the widow of Bhowanee *the power of adoption was at an end, and incapable of execution.*" The language used by their Lordships may, no doubt, support the view that the power became *extinguished.* On the other hand, if the words used be considered in the light of the facts of those cases, it may very fairly be maintained that they were not intended to convey that meaning. Because, in the first place, it was not necessary to go so far for the purposes of those cases; the expression, that the power was incapable of execution as used in the first case, being liable to the construction that it was incapable of execution in such a manner as to invest Ram Kishore with all the rights of a son, but not to render his adoption invalid,—the words 'at an end' were added in the second case for the purpose of showing that no valid adoption could be made at the time; and that the adoption was absolutely void. In the next place, Lord Kingsdown himself observes,—"If *Bhowanee Kishore* had died unmarried, his mother, *Chundrabullee Debia*, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule." This passage appears to *f*

[1] *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry*; I. L. R., 4 Calc., 23; 3 C. L. 339; L. R., 5 I. A., 138.

[2] *Tarachurn Chatterjee* v. *Sures Chunder Mookerjee*, I. L. R., 17 Calc., 122.

nish us with the real principle, namely, that the power may be exercised when the estate is vested in the widow. It makes no difference whether the estate devolves on her, just after the death of the son, or after the death of the son's widow, for in either case it comes to her as heir of her son. And it would seem that if it comes to her even after making another descent, the same principle would apply. What the Privy Council appears to lay down is, that the estate of the adoptive father must be in attendance, as it were, to drop down on the boy as soon as he is adopted, in order that the adoption may be valid. Hence it would appear that the power revives when the estate comes back to the adopting widow, and an adoption *then* made is perfectly valid,[1] because by making an adoption, she divests her own estate.[2]

It is worthy of remark here that such an adoption as this is somewhat anomalous. The adopting widow takes a limited interest in the estate inherited from her son or grandson, and the boy is adopted by her to her own husband, and does not confer any special spiritual benefit on the last full owner of the estate; at any rate the adoption may be made without his consent, yet it disappoints his reversionary heirs, to whom, it may be, the last full owner expected his estate would ultimately go. Incidents like this show that you cannot but admit that a power of adoption involves the idea of testamentary disposition to a certain extent.

**Power of adoption given by a man having two or more wives.**—When a person having more wives than one wishes to have a son adopted after his death, he may give a general authority to all his widows to adopt, or he may direct each of them to adopt a son, or he may desire any one of them to adopt a son, or he may confer a special authority on one of them to adopt.

If the adoption by a widow is, as it is generally considered to be, but an act done in the exercise of a power conferred by the husband, then when one of the widows is specially authorized to adopt, she and she alone can adopt, and may do so without consulting, and even against the will of, her co-widows who have no right in the matter, and would be incapable of adopting, even on her death without adoption.

So, when either of the widows is authorized to adopt independently of the other or others, any one of them is competent to adopt a son, without the consent or against the wishes, of her co-widow.

When, however, a husband authorizes each of his widows to adopt a son, and contemplates the adoption of a son by one widow during the lifetime of another son adopted by her co-widow,—the case is attended with difficulty. We have already seen that an authority for simultaneous adoption of two sons, one

[1] *Manikchand Golecha* v. *Jagatsettani Prankumari Bibi*, I. L. R., 17 Calc., 518, (536.)

[2] *Bykantmonee Roy* v. *Kisto Soonderee Roy*, 7 W. R., 392.

by each of two wives, is held to be invalid. Now, although the donor of the authority may not expressly say that the adoptions are to be simultaneous, yet when he authorizes each of his widows to adopt a son, in words showing his intention to be that there should be two adopted sons living at the same time, the authority may be construed to be simultaneous and not distributive, and regarded invalid and ineffectual in law. This would certainly be the result, if, under no circumstances effect could be given to an authority of that description. But you should bear in mind what I have already told you, namely, that upon the present state of law, a second adoption may be made with the consent of an existing adopted son.[1] Therefore you cannot pronounce an authority to be invalid simply because it contemplates the existence, at the same time, of two adopted sons, unless it *expressly* direct simultaneous adoption of two sons.

If a general authority is given to two or more widows to adopt a son, and there are no words showing that the power was intended to be exercised distributively, then it would seem that the authority can be carried into effect by all of them acting jointly. The question is not free from doubt and difficulty. For if one of the widows die or refuse to comply with her husband's directions, then following the rules relating to survivorship of powers,[2] the authority cannot be exercised by the survivors or by those that are willing, should all the donees be designated by name; for a naked power must be strictly construed. On the other hand, it should be remembered that the wife is the only person to whom the power of adoption may be delegated, and therefore when a person having more wives than one, gives authority to them to adopt, they may be regarded as holders of an office, and the power taken as intended to be given to the office and not to the person. Looking to the object and the peculiar character of a power of adoption, you may be justified in presuming the intention of the donor to have been to confer it on the wife or wives who may be willing to carry out his wishes. Assuming this view to be correct, suppose that several widows are willing to adopt, but they cannot all agree as to the boy to be selected, or any other matter, then the question arises, is any one of them entitled to priority? In Luckinarain Tagore's case,[3] the first widow founded her claim to adopt upon seniority, and the third and youngest founded hers upon the fact of her having borne a son to her deceased husband: the Master reported in favour of the first widow, and there being no opposition, the court confirmed the report.

In Bombay, when a widow whose husband was not member of a joint family, is permitted to adopt, without authority from her husband and without consent of his kinsmen, it is held that if there are several widows, the sen or has in case of difference the superior right to adopt even without the consen of

[1] Lecture V, p. 180 *et seq.*

[2] Farwell on Powers, pp. 367 *et seq.*

[3] Sir F. Macnaghten's Considerations on Hindu Law, p. 172.

the junior widow.[1] But it is said that the younger cannot adopt without her senior's consent, except in case of irregularity on the latter's part.[2] And it has been held that an adoption by a younger widow without the consent of the elder was invalid, the reason of the rule being that the senior wife is the indispensable associate of the husband in all religious ceremonies.[3]

**Widow is not legally bound to adopt, nor are her rights affected by her deceased husband's direction to adopt.**—Although a person may, whilst giving authority to his wife to adopt, earnestly desire her to carry out the direction, yet a widow cannot be legally compelled to act upon it, if she refuses to do so. There is no express rule on the subject in the commentaries; and regard being had to the character in which a woman may adopt according to the true construction of Hindu law, it must necessarily be a matter entirely left to the discretion of the woman who has received her husband's assent, to adopt a son or not. A Pundit of the Bengal Sudder Court, however, gave his opinion[4] that "the moment permission to adopt was pronounced, it had the same effect as if a child had been conceived in the womb of the widow, and her intention to adopt under the permission operated, to all intents and purposes, as if she were *enciente*." In a subsequent case,[5] in which a widow authorized by her husband to adopt sued as heir of her husband, an objection, based upon the Pundit's opinion was taken by the defendent to the effect that the suit for a personal right as widow did not lie, the right vesting from the time of her husband's death in the boy thereafter to be adopted by her. This theory of constructive pregnancy through a permission to adopt, and the fanciful analogy between it and real pregnancy did not meet with approbation of the court, which further observed, "The truth is, that the supposition of a positive and actual right vested in an embryo which may never come to a full existence, is one which must almost be rejected on the mere statement of it." And it was held that the fact of an authority to adopt being possessed by a widow does not supersede and destroy her personal rights as widow, and that these rights continue in full force till an adoption is actually made. The following observations throw further light on the present question,—"It is true that a widow may, from the continuance of her life-interest, have interest opposed to her duty, which should lead her, if she has a permission from her husband, to adopt a son without any delay which she can avoid. But there appears to be no power under the Hindu Law to compel a widow to adopt." This decision was approved by the Privy Council in appeal.[6]

[1] *Rakhmábái* v. *Rádhabái*, 5 Bom. H. C., A. C. J., 181; *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498.

[2] West and Buhler, p. 977.

[3] *Padajirav* v. *Rámrav*, I. L. R., 13 Bom., 160.

[4] *Ranee Kishemunee* v. *Raja Oodwunt Singh*, 3 Bengal Select Reports, p. 304 (228).

[5] *Bamundass Mookerjee* v. *Mussamut Tarinee*, 7 Moore's I. A., p. 169.

There were several cases in which the question arose whether permission to adopt affected the rights of a widow in any way and whether she could be compelled to adopt, and which were all decided in favour of the widow. It has been held that no suit can be maintained for an order directing such widow to make an adoption,[1] and even when a person appoints an executor or a guardian directing him to see that his widow adopts a son who is to look to his estate, it has been held that such direction cannot deprive the widow of her rights as heiress to her husband, unless she is expressly deprived by a gift over in case of her refusal to adopt.[2] In the latest case[3] on this subject, the law is thus explained :—

"In the judgment of the Sudder Court in *Bamun Dass Mookerjee* v. *Mussamut Tarinee*, in which their Lordships of the Privy Council expressed their entire concurrence, the Court observed that 'There appears to be no power under Hindu law to compel a widow to adopt, though a case (in Macnaghten's Principles of Hindu Law, Vol. II, p. 247) has been referred to, where there is mention of an incompetency in a widow to succeed, if she neglect to make an adoption.' It is true that 'the question of any possible check on a widow who wilfully protracts or evades an adoption specially enjoined upon her by her husband,' was not, on that occasion, before the Sadr Court or the Privy Council; and that all that was necessary to decide was, that 'the power of a widow duly authorized to adopt, to claim her personal rights until she does adopt, is not affected by any consideration of what might be, the proper course if she could be proved to have violated any clear and positive legal obligation.' We think, however, that the observations of the Sadr Court must be accepted as favouring the proposition that such a legal obligation cannot be created; and the remarks of Peacock, C. J., in *Prasannomoyi Dassi* v. *Kadambini Dasi*[4] are an authority for the view, that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

"We cannot, therefore, regard the language of the testator as having created a trust which the widow is legally bound to carry out, she is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do so, is no bar to her rights of inheritance. Accordingly, the contingency for which the Will provides not having occurred, and there being no gift over, the testator must be regarded as intestate, and his widow as heiress-at-law entitled to succeed."

It is worthy of remark that, although Hindu widows are not bound to adopt,

[1] *Mussamut Pearee Dayee* v *Mussamut Hurbunsee Kooer*, 19 W. R., 127.

[2] *Dino Moyee Chowdhrain* v. *Mr. A. D. C. Rehling*, 2 W. R., 25 Misc.; *Sremutty D Moyee Dasee* v *Tarachurn Koondoo*, 3 W. R., Misc. 7.

[3] *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R., 7 Calc., 288; 9 C. L. R., 83.

[4] 3 B. L. R., O. J., 90.

and adoptions are opposed to their self-interest, as divesting their estates, yet they do generally carry out their husband's intention.

**Adoption by a widow who is not a free agent, or is a minor.**—It should, moreover, be observed that the adoption of a son, however beneficial it may be to the soul of the deceased husband, is not absolutely necessary for the spiritual benefit of the widow who may attain to heaven by practising religious austerities, though destitute of male issue. An act of adoption by a widow, which she is not legally bound to perform, which is not conducive to her spiritual welfare, but which is highly detrimental to her temporal interests by causing divestment of her estate, must, in order to be legally binding on her, be shown to be done by her as a perfectly free agent. Where, therefore, an adoption by a young widow, whether an infant or not, is set up against her, and to defeat her rights, the court will expect clear evidence that at the time she adopted, she was fully informed of those rights, and of the effect of the act of adoption upon them; and if it find that coercion, fraud or cajolery was practised upon the widow to induce her to adopt, or that she was not a free agent, or that there has been suppression or concealment of facts from her, it will refuse to uphold the adoption.[1]

Regard being had to the above principles, it appears to be clear that an adoption by an infant widow, if not *ab initio* void, is voidable in law. I have already discussed at great length the question of adoption by a minor male.[2] The reasons that have been assigned for upholding an adoption, or rather an authority to adopt, given by a minor male do not at all apply to an adoption by a female who is not in any way benefitted by the act, which again is prejudicial to her temporal interests. A Pundit, however, is supposed to have given his opinion[3] that the non-age of the widow is no obstacle to an adoption. But his answer appears to be irrelevant to the question put to him, and rests entirely upon his *ipse dixit;* he refers, no doubt in the usual fashion of Pundits, to certain authorities which, however, are absolutely silent upon the point. To hold that an adoption, in which an infant widow is caused to take a part mechanically, valid in law, would be legalizing a pious fraud; for it must virtually be the act of those under whose custody the infant widow may be placed, and who abuse the authority they possess over the widow by making her to adopt when she is incapable of understanding the effects of the act on her own rights, apprehending that she may refuse to do so, after attaining majority, being influenced more by her personal interests than by the pious duty of adopting a so to her deceased husband.

[1] *Baydbdi* v. *Bálá*, 7 Bom. H. C. R., Ap., I; *Somasekhara Raja* v. *Subhadramaji*, I. L. R., 6 [illegible]., 524; *Ranganaya Kamma* v. *Alwar Setti*, I. L. R., 13 Mad, 214.

[2] Lecture V, p. 207 *et seq.*

[3] Macnaghten, 180.

A Bombay Sástrí gave his opinion that a widow while under puberty cannot adopt.[1] The reason for the rule may be that she is incompetent to bring forth a son then, an adoption by a woman being supposed to be analogous to the production of a son. There is no authority in Hindu law supporting that view, the origin of which may be attributed to the absurdity of the idea of a girl having a fictional son when she is naturally incapable of having a real son; and the Pundit probably thought that the lowest limit of age, proposed by him would be the reasonable one.

**No limit of time for adoption by widow.**—There is no limitation of time within which an adoption is to be made by a widow,[2] she may act upon the authority given, by her husband, at any time when the estate is vested in her.[3] But it seems that there must be a limit of time within which an adoption is to be made by a widow authorized by her deceased husband who was a member of a joint family governed by the Mitákshará; which I shall consider hereafter.

**Effect of widow's unchastity and re-marriage on power to adopt.**—Unchastity of a woman is considered a very heinous offence, specially when it is followed by conception. Thus, Parásara who professes to lay down laws for the present age, declares,[4]—"If a woman whose husband is dead or gone abroad, or who deserts her husband, conceives in adultery; that sinful and degraded woman shall be banished to a different country." A woman's want of chastity deprives her acts of all religious efficacy.[5]

As an adoption must be accompanied with religious ceremonies, an unchaste woman cannot take part in them, and is therefore incompetent to adopt. It has accordingly been held that an unchaste woman pregnant in concubinage is incompetent to adopt.[6] But after the sin is expiated by the performance of the prescribed penance, she can adopt.[7] It would seem that the sin may be removed by expiation, only when the unchastity is not followed by pregnancy.

These cases were decided at a time when it was thought that unchastity of a widow divested her of the estate inherited by her from her husband. It is, however, now settled by the Privy Council, that subsequent unchastity is no cause for divesting a widow of the estate already vested in her.[8] It has fur-

[1] Steele's Law and Customs, p. 48.

[2] Sir F. Macnaghten's Considerations on Hindu Law, p. 157.

[3] *Raje V. A. Nimbálkar* v. *Jayavantráv M. Ramadine*, 4 Bom., H. C., A. C. J., 191; *Girioss* v. *Bhimaji Raghunath*, I. L. R., 9 Bom., 58.

[4] Parásara-Smriti, Ch. X, 30.

[5] *Kerry Kolitani* v. *Moniram Kolita*, 19 W. R., 367; 13 B. L. R. 14.

[6] *Sayamalal Dutt* v. *Saudamini Dasi*, 5 B. L. R. 362.

[7] *Thukoo Baee* v. *Ruma Baee*, 2 Borrodaile's Reports, p. 488 (2nd edition).

[8] *Moniram Kolita* v. *Kerry Kolitani*, I. L. R., 5 Calc., 776: L. R., 7 I. A., 115: 6 C. L. R., 322.

ther been held that no religious ceremony is necessary for a valid adoption amongst Sudras.[1] But it should be observed that whatever reason may be assigned for dispensing with religious ceremonies in a Sudra adoption, would also apply to an adoption made by a widow belonging to the twice-born classes; since, according to the sages, the twice-born females hold the same position as Sudras, with respect to the performance of religious ceremonies.[2] I shall consider this question when I come to the formalities for adoption, and, allude to it here, for the purpose of showing that if unchastity of a widow be a disqualification for adoption, it would apply to all classes alike, without any distinction between the Súdras and the superior tribes. Considering, however, the present state of law as to the effect of a widow's unchastity, there is no cogent reason against an adoption by an unchaste widow, for it would rather be an act of self-sacrifice on her part.

Remarriage of a Hindu widow appears to render her incapable of adopting a son to her first husband, with whom her connection is completely severed on the happening of that event. For she can no longer be looked upon as the Hindu widow and the surviving half of her former husband. By her second marriage she must be transferred to the *gotra* of her second husband, become his sapinda, and become religiously united with him as one person. She loses her character of wife to the first husband, in which character alone she might adopt.

**Mitákshará School on adoption by widow with deceased husband's assent.**—Before proceeding to discuss a widow's right of adoption in the other Schools it may be useful to observe that regard being had to the general principles of law, accepted in different parts of Hindustan, Hindu law may be divided into two principal Schools, namely, the Mitákshará and the Dáyabhága School; and the former, which prevails in every province of India except in Bengal proper, may, however, be, owing to peculiarities of detail, subdivided into five minor Schools, namely, the Mithila, the Benares, the Drávira, the Mahratta, and the Punjab School. The most prominent point of difference between the two principal Schools consists in the doctrine of survivorship admitted by the Mitákshará School to operate on the joint family property, but completely ignored by the Dáyabhága School which lays down one uniform course of succession in all cases. This fundamental difference in the two Schools affects the position of the widows and other widowed female heirs to a great extent, for they cannot lay any claim to the undivided coparcenary interest of their deceased husband or other relations respectively in the joint ancestral property, except a bare right to maintenance so long as they lead a life of pure conduct. The joint

[1] *Indromani Chowdhrain* v. *Behari Lal Mullik*, I. L. R., 5 Calc., 770; L. R., 7 I. A., 24: 6 C. L. R., 183.

[2] Dattaka Mímánsá, 1, 27; Vyavahára-Mayúkha, p. 57, (Mandlik's Edition).

family being the normal condition of the Hindus, the adoption by widows of its members with the deceased husband's assent, presents some difficulty: for, the undivided interest of the deceased husband passes from the moment of his death to the surviving male members of the family, and an adoption by his widow of a son to him by his assent alone, has the effect of divesting his estate from his coparceners in whom it was already vested; in fact, it has the effect of an alienation of the undivided coparcenary interest in favour of an adopted son who may be a perfect stranger, without the concurrence of the other members of the family,—which is not permitted by the Mitákshará School, although the modern development of law has engrafted certain modifications upon that doctrine in Madras and Bombay as regards alienations *inter vivos* for valuable consideration. In this side of India the law on the subject of alienation appears to be still the same as laid down in the Mitákshará, the only modification introduced, on equitable grounds, being the compulsory sale of a coparcener's undivided interest in execution of a decree for a debt legally recoverable from him.

The adoption by a widow of a member of a joint family with the consent of the surviving members alone, appears to be consistent with the principles admitted by the Mitákshará School, and is, as I have already told you, maintained by the commentaries respected by that School. But, however, anomalous an adoption by a widow with her deceased husband's assent may be, it is now recognized in all the minor schools of the Mitákshará, except in Mithila where a Dattaka adoption is not permitted to widows under any circumstances.

The law of adoption by widows with their husband's authority is substantially the same as in Bengal. There can be no difference when the deceased husband was not a member of a joint or reunited family, for in that case his estate is vested in his widow and an adoption by her divests no estate but her own. A new point, however, arises for consideration when the deceased husband was a member of a joint family,—to which I shall presently draw your attention.

**Benares School—adoption by widows.**—In the case of Rájah Haimun Chull Sing[1] which went up to the Privy Council from Zillah Etwah a Benares District, in which it was contended that an adoption by a widow with her husband's kinsman's consent was valid, the Judicial Committee held that an adoption by a widow after her husband's death, without any authority from him was invalid. Their Lordships laid down that proposition in a guarded manner in these words:—"Without pretending to decide what is the law in other districts of India, their Lordships feel bound to say, that in this particular dist ct, upon the authorities brought forward in this particular case they must o- nounce, that the law requires the direction of the husband in order to he

[1] 2 Knapp's Reports, 203.

validity of an adoption." This decision, however, has all along been accepted by the Courts in India, as declaratory of the law of the Benares School, and it would now be too late to contend otherwise, although there are Sanskrit authorities respected in that school, maintaining that a widow is competent to adopt with the assent of the husband's kinsmen. It is therefore settled that a widow in this school may adopt only with the authority of her deceased husband.

**Limit of time for the exercise of authority when husband was a member of joint family.**—It has already been observed that in Bengal there is no limit of time during which a widow may act upon the authority to adopt, nor can she exercise the power when her husband's estate is vested in another person. If the latter rule were applicable to the Mitákshará School, there could be no adoption by a widow of a member of a joint family under his authority; for as soon as he dies, his interest in the joint property becomes vested in the surviving members of the family. But it should be observed that the strict rule of vesting and divesting laid down in Bengal cases, is not applicable to a Mitákshará joint family in which partial vesting and divesting must continually go on so long as the family retains its corporate character. For instance, suppose, a man is the only son of his father, on whose death he inherits the whole estate as his father's heir; he is absolute master of the estate and is competent to deal with it according to his pleasure. But as soon as a son is born to him he ceases to be the sole owner, and his son becomes a joint owner with him, so that he becomes partially divested of the estate he had before the birth of his son. If another son be born, he also becomes a joint owner and the interest of his father is still more reduced. If again one of them dies, the interest of the survivors increase. So a Mitákshará joint family resembles a corporation composed of the male members of the family in all of whom the family property is jointly vested. No definite share can be predicated of a particular member during their jointness. Whoever becomes a member of the family corporation by birth or adoption becomes entitled in that character to an interest in the family property, and as soon as he loses that character by death or adoption into a different family his connection with the family and its property ceases. Hence it is perfectly consistent with this character of corporate ownership of family property that a son adopted by a deceased member's widow who is a subordinate member of the family, should in the character of a male member of the family into which he is adopted, be entitled to its property. Therefore it would appear that so long as the whole family or that branch of the family to which the widow's husband belonged remains joint, there is no bar to the widow's exercising the power of adoption, given by her husband.

But it would seem that the power of adoption cannot be exercised after a partition of the family property takes place in such a manner that her husband if alive would have been entitled to a separate share. For in such a case, the

corporate character of the family is extinguished and the property becomes vested in the individual members of the family according to their shares, and they may severally alienate their shares independently of each other. A son adopted by a widow after partition cannot claim to have any share, for his adoptive father had no definite share at the time of his death, to which he might lay a claim. And to re-open the partition for giving a share to the adopted son would lead to great difficulties, for one of the co-sharers might alienate his share to a purchaser for valuable consideration without notice. Therefore following the analogy of the principle enunciated by the Privy Council in Bhoobun Moyee's case,[1] it may be affirmed that the power granted by a member of a Mitákshará joint family, to his widow to adopt becomes incapable of execution and is at an end after partition. But the point is not free from difficulty; for in a Madras case,[2] in which an impartible *ráj* was held by the eldest of two brothers constituting a joint family and the eldest brother died without leaving male issue but giving an authority of adoption to his widow, whereupon the *ráj* devolved on the younger brother by survivorship to the exclusion of the widow who subsequently adopted a son,—the Privy Conncil held that the adopted son was entitled to the *ráj* by divesting his uncle by adoption. Although this ruling may seem to be somewhat in conflict with the principle laid down in Bhoobun Moyee's case, yet it is distinguishable from that case upon the ground that the strict principle of vesting and divesting is not applicable to the property of a Mitákshará joint family, to which right accrues by birth, which passes by survivorship, and which is not subject to the rules of inheritance. The rule deduced by Mr. Mayne[3] from the above two cases is, that an adoption not only divests the estate of the adopting widow but also of one who takes before the widow, provided he would take after the son. This would be introducing an arbitrary distinction without any real difference in principle.

**Adoption with husband's kinsmen's assent in Madras, Bombay and the Punjab.**—It has already been remarked that in Madras, Bombay and the Punjab[4] provinces, a widow can adopt a son either with an express authority from the husband or with the assent of her husband's kinsmen when she was not authorized by her husband in that behalf. I have already told you that the commentators that maintain this doctrine put it upon the guardianship theory. The legal guardians of married women are their husband, son, and husband's kinsmen; therefore the son, and in his default, the kinsmen are the guardians of Hindu widows.

[1] Moore's I. A., 279; 3 W. R., P. C., 15.

[2] *Sri Virada Pratapa Ragunada Deo* v. *Sri Brojo Kishore Patta Deo*, 1. L. R. 1 Mad. ); L. R. 3 I. A., 154.

[3] Mayne's Hindu Law and Usage, § 172.

[4] See Tupper's Punjab Customary Law, Vol. III, pages 78 *et seq.*

Upon this principle there is no incongruity in an authority given by a son to his mother to adopt a son to his father. Let us take the instance of an adult son who is either unmarried, or though married, has neither wife nor male issue, directing his mother to adopt when he lies on his sickbed and is hopeless of life. The son is the legal guardian of his widowed mother, in preference to all other relations, and therefore his assent is as much effectual as that of a remoter kinsman. There is one case[1] in which a man in his last moment expressed a wish that his mother should adopt his nephew as his heir, and died leaving a widow aged five; the Pundit gave his opinion that the mother was competent to adopt, having her son's direction for the purpose. Of course the adoption would be invalid according to the present state of law, the estate of the son being vested in his widow, his mother would be incapable of adopting a son. But the Pundit's opinion illustrates the principle of guardianship.

**What kinsman's assent is sufficient?**—The Hindu commentators, while laying down that the assent of kinsmen is sufficient to authorize a widow to adopt, do not enter into any details as to whether the assent of all the kinsmen or of the majority is necessary; or whether there is any rule of priority based upon proximity of relationship or upon nearness as regards jointness or as regards reversionary interest in the husband's estate, so as to determine any particular individual or individuals whose assent is essential and sufficient; or whether the consent of any one kinsman is requisite? Some of them, however, do mention the name of the father-in-law as the person whose consent would be sufficient.

The answer to these questions is to be sought in the decisions of Courts. The first case which throws considerable light on the subject is the Ramnad case[2] in which the Judicial Committee deal with the question, By whose assent the defect of the husband's authority must be supplied? The following observations bear upon the point under consideration:—

"It must, however, be admitted that the doctrine is stated in the old treatises, even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family, *i. e.*, undivided, that question is of comparatively easy solution. In such a case, the w[illegible]ow, under the law of all the schools which admit this disputed power of a[illegible]ption, takes no interest in her husband's share of the joint estate, except a

[1] Strange's Hindu Law, Vol. I, page 93.

[2] *Collector of Madura* v. *Muttu Ramalinga Sathupathy*, 12 Moore's I. A., 375; 1 B. L. R., [illegible], 1; 13 W. R., P. C., 17.

right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the assent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt, when not actually given by the husband, can only be exercised when a foundation is laid for it in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend on the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive. In this case no issue raises the question that the consents were purchased, and not *bonâ fide* obtained. The rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption."

The particular kinsmen whose consent will be sufficient under particular circumstances are indicated by their Lordships, although that question did not arise in this case in which the adoption was made with the assent of the majority of the kindred. It should be noticed that the father-in-law if alive, is undoubtedly the person whose consent would be necessary and sufficient.

**Consent of members of joint family.**—When the deceased husband of the widow desirous to adopt was a member of a joint family, the requ authority must be sought within the family; for in the first place, the survi members are naturally her legal guardians to whom she looks for her mai nance; and in the second place, the effect of an adoption by the widow is introduction of a new member in the family, and of a co-sharer of its es

hence it is reasonable that she should be guided by their advice, and not by that of divided sapindas or kinsmen.

This point arose for decision in a case before the Travancore Court, in which a widow adopted a son without the consent of the surviving undivided brethren of her husband, but with the assent of his divided kinsmen. Following the observations of the Judicial Committee in the Ramnad case, that Court held the authorisation to be insufficient. This view was approved by the Privy Council in the Chinna Kimedy case in which the facts were as follows:—A person holding an impartible zemindari died leaving a widow and an undivided brother, in whom the zemindari vested; the widow adopted the son of a distant and divided kinsman of her husband without the consent of the undivided brother. In the litigation that arose the validity of the adoption was sought to be maintained upon two grounds: 1st, a written authority from the husband, 2nd, the sufficiency of the assent of the distant divided kinsman, implied by the act of giving his son in adoption. The Madras High Court did not come to any definite finding as to the genuineness of the written authority, but held the adoption to be valid upon the ground that the assent of one Sapinda was sufficient, independently of the consideration whether he was near or distant, divided or undivided. This conclusion was founded upon the supposed analogy between the ancient obsolete practice of appointment of widows to raise issue by carnal intercourse, and the modern usage of adoption with the assent of husband's kinsmen.

On appeal the Privy Council upheld the adoption upon the ground that the written authority was proved. But in order to prevent misconception of the subject their Lordships dissented from the view expressed by the High Court of Madras, thus[1]:—

"Positive authority, then, does not do more than establish that, according to the law of Madras, which in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly authorised by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognised in the Travancore case, *viz.*, that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but in food and worship; therefore not only all the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members or by

[1] *Sri Virada Prataba Ragunada Deo* v. *Sri Brojo Kishore Patta Deo*, I. L. R 1 Mad. 69; L. R., 3 I. A., 154; 25 W. R., 291.

the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into, and becomes a member of, that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her. These seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family, and obtain the authorisation required, from a separated and remote kinsman of her husband.

"Mr. Justice Holloway, however, not directly determining anything adversely to the principle affirmed in the Travancore case, distinguishes the present on the ground that, although the family must be taken to be undivided, the particular property is to be held in severalty and not in coparcenary. It is not necessary for the determination of this appeal that their Lordships should decide whether this distinction can be supported, and they abstain from doing so. They may, however, observe that a distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr. Justice Holloway has himself strenuously insisted upon elsewhere, *viz.*, that the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it.

"Their Lordships desire further to observe, that, even if the distinction suggested were adopted, it would be necessary, in order to maintain the present adoption as one duly made without the permission of the husband, to go the full length of ruling that the assent of one separated and distant sapinda (and that the natural father of the child taken in adoption) is an authority sufficient to validate the act.

"Mr. Justice Holloway, indeed, in one place treats Raghunada as an assenting party to the exercise of the power to adopt, though not to the particular adoption.

"Their Lordships, however, are of opinion that even this general assent is not established by E. E., or by the other evidence in the cause. The parol testimony on this point is untrustworthy; and E. E., taking it at its highest, is consistent with the supposition that Raghunada then intended only to provide for the contingency of the Mahadevi's establishing the authority to adopt, whi she said she had derived from her husband, and exercising it in favour of h son. It must therefore, be taken that the only Sapinda of Adikanda, who shown to have assented to this adoption, is the Rajah of Peddakimidy, th father of the adopted child; and their Lordships have already intimated thei

grave doubts whether such assent, would, in any case, have constituted a sufficient authority."

It is settled by this decision that where the deceased husband left undivided coparceners, their consent is necessary. The next question that arises is, whether the consent of all the members is necessary, or whether that of the majority or of a particular individual is sufficient? We have already seen that in the Ramnad case it is intimated that the father of the husband may, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise adoption by her; but if there be no father, the consent of all the brothers, who would, in default of adoption, take the husband's undivided coparcenary interest, would probably be required. Following this reasoning it appears that when a joint family consists of several branches, the consent of the members of that branch to which the husband belonged would be necessary, for an adoption by the widow would defeat their right. Perhaps the consent of the managing member who is not influenced by any improper motive, may be sufficient.

**Whose consent when husband separate?**—It has already been seen that when the husband was separate, the consent of the majority of the sapindas including the nearest is sufficient. It would appear that the consent of the presumptive reversionary heir must be taken. The principle upon which the Judicial Committee base their conclusion that the consent of a divided kinsman is not sufficient without the consent of an undivided kinsman, may, to a great extent, support the proposition that the person whose interest would presumably be defeated by adoption is the kinsman whose consent is requisite. The Madras High Court, however, does not assent to it on the ground that the validity of adoption should be determined by spiritual rather than temporal considerations, and that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere acccssory to it. But you should bear in mind what I have already told you, namely, that an adoption is more a temporal than a spiritual institution, there being no spiritual reason for adoption if the deceased left a fraternal nephew. And it must not be forgotten that the requisites of a valid adoption are all temporal, therefore the spiritual considerations should not be allowed to influence the judgment regarding the secular essentials of a valid adoption. Some light is thrown on the point by the decisions relating to alienation by widows with the assent of the next heir. The Bengal view of the law is that an alienation with the consent of the presumptive reversionary heir passes an absolute estate to the alienee.

When two kinsmen are of the same degree, the consent of one of them, *bona fide* given, was held sufficient when the other withheld his assent to the particular adoption from an interested and improper motive, for he was willing to give his

own son in adoption, from which his general consent to adoption could very well be inferred.[1]

**Effect of improper motive on the part of the adopting widow or the assenting kinsman.**—The motive of the widow and the assenting kinsman may also be taken into consideration in order to see whether the act is done for religious purposes. In the Ramnad case, the Privy Council observe:—"All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." It should be noticed that what the Judicial Committee intended to lay down in this passage is that the motive of the assenting kinsman may be scrutinized for the purpose of determining whether the widow was actuated by any improper or corrupt motive. Apart from that, the mere circumstance that a widow by an ante-adoption agreement with the natural father intended to retain certain interest in her husband's estate in derogation of the adopted son's rights *does* not constitute a corrupt motive such as would invalidate an adoption. The following observations of the Privy Council[2] clear the point from obscurity:—

"This being so, is there any ground for the application which the High Court has made of a particular passage in the judgment in the Ramnad case. The passage in question perhaps is not so clear as it might have been made. The Committee, however, was dealing with the nature of the authority of the kinsmen that was required. After dealing with the *vexata quæstio* which does not arise in this case, whether such an adoption can be made with the assent of one or more sapindas in the case of joint family property, they proceeded to consider what assent would be sufficient in the case of separate property; and after stating that the authority of the father-in-law would probably be sufficient, they said:—

'It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence,' not, be it observed, of the widow's motives but 'of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased and not *bonâ fide* attained.'[3]

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular mo-

[1] *Parasara Bhattar* v. *Rungaraja Bhattar*, I. L. R., 2 Mad., 202.

[2] *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*, I. L. R., 1 Mad., 174 (190); L. R., 4 I. A., 26 W. R., 21.

[3] 12 Moore's I. A., 397 (442).

tives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband. If that be so, there seems to be every reason to suppose that in the present case there was such a consideration, both on the part of the widow and on the part of the sapindas; and their Lordships think that in such a case it must be presumed that she acted from the proper motives which ought to actuate a Hindu female, and that at all events, such presumption should be made until the contrary is shown."

The motive of the assenting kinsman who holds a fiduciary character should be particularly taken into consideration, both for the purpose of seeing whether there was any corrupt motive on the part of the widow, as well as for determining the sufficiency of the assent given by him. Accordingly it has been held by the Privy Council in another case[1] that the assent of the managing member was insufficient and not binding on the other members, inasmuch as in giving it he was influenced by undue considerations.

**Assent implies exercise of discretion.**—The consequences of an adoption by a widow are adverse to the interests of the kinsmen whose assent is requisite, it is therefore proper that they should have an opportunity given them to exercise their discretion whether to give or withhold their assent. An assent given under a misapprehension would not be legally sufficient. In the Chinna-Kimedy case[2] already referred to, there is the following observation relating to the exercise of discretion by the sapinda before giving a valid assent:—

"In the present case there is an additional reason against the sufficiency of such an assent. It is admitted on all hands that an authorisation by some kinsman of the husband is required. To authorise an act implies the exercise of some discretion whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is, that the Mahadevi, representing herself as having the written permission of her husband to adopt asked the Rajah of Peddakimidy to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Rajah ever supposed that he was giving the authority to adopt which a widow, not having her husband's permission would require."

Upon similar ground, an adoption by the widow of the son of the manag-

[1] *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*, I. L. R., 2 Mad., 270.

[2] I. L. R., 1 Mad., 69 (82).

ing member of the family,[1] and of a sapinda[2] was set aside, as the mere gift of the son in adoption upon the footing of the existence of an authority from the husband, was not considered sufficient assent to validate the adoption, when the husband's authority could not be established.

The following observations of their Lordships on the character of adoptions by widows with kinsmen's consent deserve careful study[3]:—

"Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission, to adopt a son to him, which, before the decision in the *Ramnad case* (1), had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice, administering the Hindu law, to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and, it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it; and the propositions of Mr. Justice Holloway appear to their Lordships calculated unduly to enlarge those limits."

**Effect of husband's express or implied prohibition.**—Although the doctrine of adoption by widows with kinsmen's assent rests, according to the Hindu commentators, on the guardianship theory, yet kinsmen's assent is now accepted as substitutive of that of the husband. Even in such a case an adoption is not to be supposed to be independent of the husband, but his authority is to be presumed if his kindred give their assent. According to this modern theory no adoption can take place with the assent of kinsmen if the husband did, in express terms or by necessary implication, prohibit an adoption by his widow. The law on the subject has been explained by the Privy Council in the following passage[4]:—

"Again, it appears to their Lordships that, inasmuch as the authorities in

[1] *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*, I. L. R., 2 Mad., 270.

[2] *Venkatalukshmamma* v. *Norasayya*, I. L. R., 8 Mad., 545.

[3] *Sri Virada Pratapa Raghunada Deo* v. *Sri Brojo Kishoro Patta Deo*, I. L. R., 1 Mad., 69: L. R., 3. I. A., 154; 25 W. R., 291.

[4] *Collector of Madura* v. *Muttu Ramalinga Satthuputty*, 12 Moore's I. A., 375; 1 B. L. R., P. C., 1; 10 W. R., P. C., 17.

favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs, on the ground of religious obligation to adopt a son in order to complete, or fulfil, defective religious rites."

From the above observation it follows that where there is such a clear disposition of property by the husband, as would preclude the son adopted from claiming the estate left by him, a prohibition may be deduced by implication. But even then it will not preclude an adoption if there be a failure of the disposition. Thus in the same case their Lordships observe,—

"It has been argued, however, that even if this adoption could have been regular had *Ramasamy* died childless and intestate, his *arzi* relating to the management and descent of the *zemindary* contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow: Their Lordships cannot accede to this argument. Ramasamy, no doubt, intended to be represented by his daughters' line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt, when on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt, except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law."

It has, however, been held[1] that the fact that a son was left behind by the husband at the time of his death will not operate as a prohibition to adopt. In this respect an adoption with the assent of the husband's kinsmen is just on the same footing as an adoption with an authority from the husband. And as a husband may authorize his widow to take a son in adoption in the event of the death of a natural born son dying without leaving a widow or male issue, so as to enable her to adopt on the happening of that event, so under the same circumstances the kinsmen are competent to authorise her to adopt a son. In fact, a widow without any permission from her husband may, if duly authorized by his kinsmen, adopt a son to him in every case in which such an adoption would be

[1] *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*, I. L. R., 1 Mad., 174.

valid if made by her under a written authority from her husband. Accordingly, a second adoption with kinsmen's assent would be valid, if the son first adopted with an express authority from the husband, dies under age and unmarried.[1]

**Competition between mother-in-law and daughter-in-law.**—When there is a competition between a mother-in-law and a daughter-in-law for adoption with the assent of the sapindas, she, in whom the family estate is vested, would be entitled to adopt. For, according to the principle laid down in Bhoobun Moyee's case and followed in other cases, as I have already told you, if the estate is vested in the daughter-in-law, the mother-in-law cannot adopt. But if the ancestral estate be vested in the mother-in-law by reason of the son predeceasing the father, then it would appear that both the mother-in-law and the daughter-in-law are competent to adopt. What has been laid down is, that the adoptive father's estate must be vested in the adopting widow, in order that an adoption made by her, may be valid. If the daughter-in-law adopts first, then the mother-in-law cannot make an adoption during the life of the son adopted by the daughter-in-law, for the father-in-law cannot, under that circumstance, be considered as destitute of male issue, there being that grandson by adoption in existence. But if the mother-in-law adopts first, then the daughter-in-law cannot be precluded thereby from making an adoption for the spiritual benefit of her husband who would not be benefitted by his mother's adoption. This distinction would apply to all similar cases in all the schools.

**Bombay school and adoption without any authority.**—The law of adoption by the widow is the widest in Bombay. There, a widow may adopt (1) either with the express authority of the husband, (2) or with the assent of the husband's coparceners when he was undivided, or (3) when he was separate and his estate is vested in her, she may adopt without any authority either from the husband or from his kinsmen.[2]

As regards the rules relating to adoption by the express assent of the husband, they are substantially the same as in Bengal with this difference that the strict rule of construction whereby the terms of an authority cannot be varied or extended in Bengal is not applicable in the Mahratta country where not only there is no presumption against authority, as in the Bengal provinces, but where the contrary presumption prevails, namely, the presumption of implied assent in the absence of express prohibition. In Bengal an adoption by a widow will fail in the absence of express authorisation, whereas in Bombay the husband's authority may be replaced by the substituted assent of his coparceners when he was joint, and may be presumed, when he was separate.

The adoption with the consent of the kinsmen stands on the same footin[g] as

[1] *Parasara Bhattar* v. *Rangaraja Bhattar*, I. L. R., 2 Mad., 202.

[2] *Ramji* v. *Ghamau*, I. L. R., 6 Bom., 498.

in Madras, with this difference that in Bombay such assent being necessary only when the husband was a member of a joint family, the *vexata quæstio*, whose assent is sufficient when the husband was separate? does not arise, the widow being competent to adopt without such assent. The rules enunciated in Madras cases in respect of the consent of kinsmen in so far as they relate to an adoption by the widow of an undivided Hindu will apply to Bombay cases.

The adoption by the widow of a separated Hindu without his authority is a peculiarity and requires especial treatment.

You will bear in mind that when a person who was separated from his co-heirs or had no co-heir at all, dies without leaving male issue, his widow is his heiress and takes the entire estate left by him. The adoption of a son is not at all necessary for the widow's own spiritual benefit, however conducive the possession of a son may be to the spiritual welfare of her husband. An adoption of a son by a widow is prejudicial to her own temporal interests, as she becomes divested of her husband's estate that vests in the adopted son from the moment of his adoption, while she is not personally a gainer in a spiritual point of view. A widow therefore that proceeds to adopt a son manifests at the same time a conscientious regard for the spiritual benefit of her husband, and a perfect disinterestedness by disregarding her personal rights of property, of which by her own voluntary act she divests herself. It is upon these grounds that the validity of an adoption without authority rests, provided it is made from a purely religious motive and not capriciously nor from corrupt motive.

This peculiar development of law, probably owes its origin to the character of the interest which the female heirs taken in property inherited by them from males. There is no indication in any of the commentaries of the Mitákshará school that a female heir takes a lesser interest than a male heir. The Dáyabhága rules, however, have made a considerable inroad into the Mitákshará school, and have rendered the position of women less favourable than it had stood under the authorities of that school. According to them the widow is entitled to take an absolute estate and there is no reason why she should not, regard being had to the circumstances under which she is entitled to inherit, as well as to the fact that a male heir, however distant, takes an absolute estate. The very cogent reason that exists in the Bengal school for restricting the estate of the female heirs has no application to the scheme of inheritance in the Mitákshará school, according to which the widow is excluded from inheritance when the husband was a member of a joint family, and is entitled to succeed only if he was separate; whereas, according to the Bengal school she is entitled to inherit whether her husband was joint or separate. The fact of separation indicates that a man is more affectionately disposed to his wife and own family than to brethren from whom he separates; while jointness discloses that mutual harmony and attachment subsist between the brethren. This appears to be the real

foundation of the Mitáksará scheme of devolution of property. On the other hand the Dáyabhága raises the position of sonless widows by giving them a limited right to their husband's undivided share; for, a bare right to maintenance is likely to reduce their position to the level of the maid-servants of the family. Hence the reasons which justify the Dáyabhága rule for limitation of widow's estate, do not apply to the inheritance of widows under the Mitákshará, who could be heirs only in the exceptional circumstance of their husband being separate, joint family being the normal condition of Hindu society. The Bombay High Court have taken a correct view of the Mitákshará law, so far as regards the daughter's rights in the property inherited from her father, but there is no reason for not applying the same doctrine to the widow and the other enumerated female heirs, excepting perhaps the fact that all the sapinda females have recently been recognized to be entitled to inherit, to whom that Court hesitate to give absolute estate. The division, by the Bombay High Court of the female heirs into two classes, namely, into those that enter into the *gotra* by marriage, and those that are born in the *gotra* but pass out of it by marriage, and the doctrine based upon it that the female heirs of the former class take an absolute estate and those of the latter a limited interest,[1]—are modern developments of law, not founded upon anything contained in the Sanskrit commentaries, except perhaps the forced construction of the well-known text of Kátyáyana in that way. This view has led to the anomaly that the mother falls in the less favoured class, whilst the sister takes an absolute estate. The proper view to take on the subject according to the Mitákshará school seems to be, that all the female heirs take an absolute estate. As for the text of Kátyáyana, limiting the widow's estate, it may very fairly be construed to refer to the widow of a member of a joint family, who is entitled to maintenance out of the undivided co-parcenary interest of her deceased husband in the family property. The text may be rendered,—"Let the widow enjoy with moderation her husband's estate; the surplus left after her enjoyment, let her husband's undivided co-parceners take."[2]

The adoption by the widow of a separated Hindu, does no doubt defeat the rights of the reversionary heir. But if the widow takes an absolute estate, the only objection that might arise to the capacity of a widow to adopt a son, vanishes. This, however, removes the objection when such adoption is viewed simply as a mode of transferring property or an appointment of an heir. But as adoption in Hindu law means more than that, and is the introduction of a stranger as a relation to all persons connected to her husband herself, the power conceded to the widows is in reality a very grave

[1] See Mayne's Hindu Law, §§ 569-570.

[2] सुस्त्रीणामरणाद् भर्त्ता दायादा ऊर्द्धमाप्नुयुः। See Dáyabhága, xi, i, 56 (original).

important one, at least according to the modern view of the adopted son's rights of inheritance in the family into which he is adopted. Whatever may be the principle that underlies this exceptional privilege enjoyed by widows in Bombay to adopt a son independently of any authority from the husband, or of the assent of his kinsmen, it rests entirely on religious considerations, and the widow must be guided entirely by those rules of Hindu law regarding the choice of the boy to be selected, that have been declared to be of moral obligation in the case of an adoption by the husband to whom a greater discretion is allowed by law in respect of the selection of the boy.

A widow therefore proceeding to adopt without authority must strictly follow the rules of the Shasters and take the nephew of the husband, if available for adoption. But when he is not available, any other boy may be taken.

LECTURE VII.

## WHO MAY GIVE, AND WHO MAY BE GIVEN, IN ADOPTION.

Capacity to give in adoption—Rishi texts—Commentators—Mitákshará—Vyavahára-Mayúkha—Vaijayantí—Dattaka-Mímánsá—Jagannátha—Dattaka-Chandriká—Father's power and mother's assent—Gift by the mother—Distress—Parents only have power to give, they cannot delegate—Assent of the son—Assent of relatives—Assent of the King—An adopted son cannot be given in adoption—Gift of the first-born, or youngest, or one of two, or an only, son—Rishi texts on the same—Observations on them—Commentators—Mitákshará—Vaijayantí—Dattaka-Mímánsá—Nanda Pandita's views—Dattaka-Chandriká—Dattaka-Nirnaya—Jagannátha—Conclusion deducible from commentaries—European authorities—Case-law relating to the first-born and one of two sons—Case-law on validity of adoption of an only son in Madras, N. W. Provinces and the Punjab—Adoption of an only son was valid in Bengal and Bombay down to 1868—Dvyámushyáyana adoption of an only son—Since 1868 adoption of an only son invalid in Bengal—Tendency in the same direction in Bombay—Observations on this recent view of law—Adoption of an only son when co-existing with another son's natural or adopted son or grandson—Adoption of *one* son by two or more persons.

**The capacity to give a son in adoption,** appears to be a survival of the *patria potestas* of ancient law, according to which a man could exercise absolute dominion over the persons placed under his power, and which extended to his wives, children and their wives and descendants whom he could sell, give or punish in any way he pleased. The Hindu legislators, endeavoured, as we have already seen, to curtail this power by impressing a sacred character on the family relationship, and by prohibiting the sale of wives and children as being sinful. A sale or gift of a son, though much disapproved and forbidden in a religious point of view, was, however, permitted, if made for adoption, and at a time of distress such as famine, and the power of making a sale or gift for that purpose, was reserved for the parents alone, whose natural love and affection form a sufficient safeguard against an improper exercise of the same. Regard being had to the legal consequences of an adoption, the effect of which is to cut off all the natural ties with which a child is fastened to the affection of other persons, to sever in fact for ever his connection with his parents and all persons related through them, and to destroy every description of rights in the family of his birth,—it is evident that the capacity to give, fraught with such serious le l incidents upon the prospects of the infant who is the subject of the gift, an s incapable on account of the tenderness of his age to take care of his own · terests, should be guarded in such a way as it may not be exercised except · the benefit of the boy. The only redeeming feature of the instit- — ı

appears to be very harsh, if not cruel, to the boy, is, that looked from one point of view, it may be regarded as an advancement of the boy who becomes entitled to inherit the estate of the adopter. Considering the natural love and affection of the parents on whom the prospects of a child depend to a great extent, the power of giving away a son in adoption may safely be entrusted to them without any apprehension of its being exercised to the prejudice of the boy who is unable to exercise any discretion of his own in the matter.

**Rishi texts.**—Accordingly Manu declares,[1]—"He is called a *Datrima* son whom his mother or father affectionately *give* (ददातां in the dual number) as a son, being alike, and in a time of distress, confirming the gift with water." You will observe that the dual number in the verb *give* would be grammatically incorrect, if you were to take the sentence as it is; hence this text is construed[2] to intend three alternatives, namely, that "either the mother, or the father, or both the mother and the father, *give*."

Yájnavalkya describes an adopted son thus,[3]—"A *Dattaka* son is one whom his mother or father gives."

Baudháyana ordains,—"He is called a *Dattaka* son who being given by his father and his mother or by either of the two, is received in the place of a child."[4] Another passage attributed[5] to the same sage, declares,—"Both parents alone have the power, for the connection to them is equal."

Vishnu declares,—"The Dattaka son is the eighth, and he is his to whom he is given by both the mother and the father."[6]

Vasistha ordains—"The second is the Dattaka son, whom his mother and his father give."[7]

From these passages it appears that each parent has severally and independently of the other the power of making the gift of a son in adoption; but when both are alive and present their concurrence is necessary.

But Vasishtha[8] and Baudháyana[9] premise the ceremonies of adoption with the following passage which lays down a special rule curtailing the mother's power of gift,—"A son produced from the virile seed and uterine blood is an effect whereof the mother and the father are the cause; the mother and the father, therefore, are competent to give, sell, or abandon him. But let not an only son be given or accepted, for he is to continue the line of the ancestors. But a woman shall neither give nor accept a son, except with the assent of her husband."

This passage raises two questions, namely, first, as to the relative power of

[1] Mann IX, 168.
[2] Dat-Mím. IV, I5.
[3] Yájnavalkya II, 131.
[4] Baudhayana II, 2, 3, 20.
[5] Dattaka Mímánsa IV, 14.
[6] Vishnu, XV, 18-19.
[7] Vasishtha, XVII, 28-29.
[8] Vasishtha XV, 1-5: Dat. Mim. IV, 14; V, 31.
[9] Baudháyana-Parisishta, VII, 5, 2-6.

the father and the mother when both are alive, and second, as to the capacity of a widowed mother to give a son in adoption. Let us see how the commentators have dealt with these questions, upon the above passages of law, bearing upon them.

**Commentators.**—But before considering the views of the commentators, it is necessary to observe that an adoption should be looked at from two different points of view, first, the ancient view according to which it was the transfer of *patria potestas* or paternal property over a child; and second, the modern view, namely, the severance of connection with the natural relations, and the cessation of the rights, duties and obligations both temporal and spiritual, springing from relationship, and strengthening its ties, with which the ancient law has been modified and softened. According to the ancient usage, the father alone would undoubtedly have the right to transfer his dominion by gift, and the mother would have no such right. But the sages have, by recognizing the mother's right to make a gift in adoption has given a different character to the institution; though her dependent position requires that she must not act in this matter, independently of her husband. On the other hand, the law as it stands at present does not at all recognize that kind of dominion which a father could formerly exercise over his children, and a gift in adoption must now be taken in a figurative sense, in the same way as the gift of a damsel in marriage is understood by some commentators. The principle upon which the father's right of gift, independently of the mother, was founded has ceased to exist; there is therefore no reason for supporting the position that a father may even at the present day, give a son in adoption without the consent and against the will of the mother, so as to sever the connection of the son with her and her relations. The commentators who were approaching towards the modern view, appear to take a middle course as will presently appear.

In order to properly understand the subject, you must bear in mind three things:—first, the father's *patria potestas;* second, the natural rights of both parents, according to which both of them have a joint interest in their child; third, the life-long state of pupilage of women. The first doctrine cannot now be acted upon, the third also has ceased to be law, excepting the provision in the Court of Wards Act according to which females, as a general rule, are deemed to be disqualified for managing large estates, which may be regarded as a traditional relic of the ancient law.

**Mitákshará.**—While explaining Yájnavalkya's definition[1] of a *Dattaka* son, the Mitákshará says,[2]—"He, who is given by his mother with her husband's consent, while her husband is absent, (or incapable though present,) or (without his assent) after her husband's decease, or who is given by his father, or by

[1] Mitákshará, 1, 11, 1.

[2] Mitákshará 1, 11, 9.

both, being of the same class with the person to whom he is given, becomes his given son." The words in parenthesis are the gloss of Bálambhatta. Then the author of the Mitákshará cites the above text of Manu and observes,—"By specifying distress, it is intimated, that the son should not be given unless there be distress.[1]

The author of the Víramitrodaya[2] says,—"He, whom the mother with her husband's assent, or the father gives to another, becomes his adopted son," and then quoting the text of Manu, observes,—"By specifying 'at a time of distress,' it is indicated that the giver incurs sin in the absence of distress: the mother and the father may give either separately or jointly."

**Vyavahára-Mayúkha.**—Referring to the above text of Manu, describing a Dattaka son, Nílakantha observes,[3]—"From the particle 'or' (वा in the passage "the mother *or* the father *give*") it appears that in default of the mother the father alone may give; and in default of the father, the mother alone; but if both are in existence, then even both: this, Madana (says)."

**Vaijayantí.**—In his commentary on the Institutes of Vishnu, Nanda Pandita says as follows:—The question, By whom is the gift to be made? is thus answered, "He again, is his (to whom) he is given by both the parents,"[4] *i. e.*, the Dattaka son becomes his to whom he is given by both the father and the mother, because Vasishtha ordains,—"Both the mother and the father are competent to give &c." The mother alone is also competent to give with the assent of her husband, because it is ordained by the same sage that,—"A woman shall neither give nor accept a son except with the assent of her husband." Similarly, the father alone is competent to give, because Manu declares,—"The son whom the mother or the father may give in distress &c."

**Dattaka-Mímánsá.**—We have already seen that Nanda Pandita does not recognize the right of women to adopt: according to him a woman can only act as an agent of her husband during his lifetime, and in such character may take a boy in adoption with his express permission; but a widow cannot adopt at all. As to a woman's power of gift of her son in adoption, he argues in the same strain, but is compelled by the overwhelming authority of the sages, to make some concession in favour of females. He cites the following text of Saunaka,—"By one, having an only son, (*eka-puttrena*) the gift of a son should not be made; by one having many sons (*bahu-puttrena*) the gift of a son should anxiously be made;"[5] and he opens the subject of women's power of making the gift of a son in adoption by the following observation,[6]—"Since the masculine gender is used in the compound word 'by one having many sons' (*bahu-puttrena*) the

[1] Mitákshará, 1, 11, 10. [2] Víramitrodaya; page 115.
[3] Vyavahára-mayukha p. 50. (Mandlik's Edition); see original, p. 39.
[4] Vishnu, xv, 19. [5] Dat. Mím. 4, 1. [6] Dat.-Mím. 4, 9. Compare with 1, 15.

gift of a son, by a woman is prohibited"; and in support of this position he refers to the absence of independence in women, ordained by Vasishtha in the passage "Let not a woman either give or accept a son." But he admits that a woman also is competent to give a son with the husband's assent, because Vasishtha adds "except with the assent of her husband."[1] He meets the argument, based upon the texts of Manu and Yájnavalkya, that the father and the mother have equal right in this respect, by saying that what is predicated of the mother in these passages must be taken to be subject to the assent of her husband.[2]

It should be remembered that while dealing with a woman's power of adoption, Nanda Pandita maintains[3] upon the authority of that very text of Vasishtha that a widow cannot adopt at all on account of the impossibility of the husband's assent. The same argument would also apply to a widow's *right to* give. But he obviates it and maintains the right of widowed mothers to give their sons in adoption during a season of distress, upon the grounds, that the assent must be presumed inasmuch as there is a *vedik* instance indicating the legality of such gift, and that the right to give is independently and severally predicated of the father and of the mother, in many texts of the sages.[4]

The author then propounds that the husband, singly even and independent of his wife, is competent to give a son; because, says he, in several passages of law the father is mentioned singly and unassociated with the mother; and he further assigns some fanciful reasons for supporting that position.[5] I may mention here that having regard to the context this proposition may be taken to refer to a widower.

But he admits, referring to the passages of Manu, Baudháyana, Vasishtha and Yájnavalkya, that three positions are intended to be laid down:—first, the competency of both parents united, is the principal; second, that of the father alone independently of the mother, is the mediocre; and third, that of the mother, depending as it does on the assent of her husband, is the inferior alternative.[6]

In this connection should be taken into consideration the following observation made by Nanda Pandita while explaining, a part of Saunaka's passage dealing with the ritual of adoption, which runs as follows:—"The giver, being capable of the gift, should give to him &c";[7] Nanda Pandita says,—"The capacity to give, consists in having a plurality of sons, *and in the assent of the wife.*"[8]

[1] Dat.-Mím. 4, 10.
[2] Dat. Mím. 4, 11.
[3] Dat.-Mím. 1, 15-16.
[4] Dat.-Mim. 4, 12.
[5] *Idem* 4, 13.
[6] Dat. Mím. 4, 14-17½.
[7] Dat.-Mim. 5, 13.
[8] *Idem*, 5, 14.

This passage at any rate shows that if both the father and the mother are alive, then for the religious gift of a son, by the father, it is absolutely necessary that the mother's assent should be taken.

**Jagannátha** considers the gift of a son from two aspects of view, namely, the gift as transferring the dominion, and the gift for adoption. As regards the gift for adoption, he is of opinion that, if both the father and the mother are alive, they must join in making the gift; but if the wife is dead, the husband alone may make the gift, and if the husband is dead, the widow may make the gift if the deceased husband gave his assent.[1] But the learned author goes on to observe that the husband alone may make the gift of a son, without consulting his wife, so as to transfer the parental dominion; but his donation cannot annul the right of his wife over the son: a gift of a son by the father alone, cannot annul the right of the son's mother; such a gift may generate the dominion of the donee over the son, but he cannot be the donee's adopted son in the absence of the son's mother's consent, whose rights over the son cannot be annulled by the donation of her husband alone. The author is of opinion that the donee must take the assent of the boy's mother to the gift, if he wishes to take the boy for adoption.[2]

**The Dattaka-Chandriká** does not enter into a detailed discussion of the relative rights of the father and the mother to make the gift of a son in adoption,—but the following observations are made with respect to the right of females to give their son in adoption.—"But, by a woman, the gift may be made with her husband's sanction, if he be alive; or *even without it*, if he be dead, or remotely absent, or retired from the world. Accordingly Vasishtha ordains,—'Let not a woman, either give or receive a son, except with the assent of her husband.' Now, if there be no prohibition even, there is assent; on account of the maxim,—'The intention of another is sanctioned, if not prohibited.' Gift (by a woman) independently (of the husband) is laid down by Yajnavalkya,—'He, whom his father or mother gives, is the Dattaka son,' likewise (by Manu in describing the deserted son,[3])—'Deserted by the father and the mother or by either of them."[4]

**The father's power and the assent of the mother.**—The conclusion following from the above authorities, is, that when both the parents are alive their concurrence is necessary in the religious if not also in the legal point of view. When the father makes the gift, the assent of the mother may be presumed, at any rate, an active opposition on the part of the wife to her husband's action cannot be expected, and is not found to have arisen in any case. The same reasons

[1] Colebrooke's Digest, Book V, verse, 272; Vol. II, 387. (Madras Edition.)
[2] Colebrooke's Digest, Book V, verse 273; Vol. II, page 388, (Madras Edition.)
[3] Manu IX, 171. [4] Dat. Chand. 1, 31-32.

which induce the father to make the gift of a son, would, together with her husband's authority, sway the mother to acquiesce in her husband's action. Hence the absence of express assent of the mother cannot invalidate an adoption when the father alone makes the gift, such assent may always be presumed.

But the question assumes a different shape, if the mother does actively oppose the gift of her son, proposed or made by her husband alone, against her will. Under the present state of law, Hindu wives are not subject to their husband's control in the same degree, as we find them according to the strict rules of the Hindu law. Cases of disagreement between Hindu husbands and wives are not now unheard of, owing to the changes brought about by the dissemination of Western ideas in Hindu society, in which the husbands may appear to be at fault. Suppose, a poor man marries a rich person's daughter, and consents to live in his father-in-law's house with his wife, as what is popularly named a *Ghar-jámái*, or "a *domesticated* son-in-law" as he is sometimes facetiously called; he lives in that way for some years, gets some children, and subsequently falls into disagreement, leaves his father-in-law's house, and actuated by sheer animosity negotiates for giving in adoption a son of his, against the will of his wife and the father-in-law who has all along been maintaining the man and his family, and who very dearly loves the particular child. Suppose again, that a husband of two wives, has only one son by one of them, and several sons by the other, and the former wife incurs his severe displeasure, and in consequence he proposes to deprive her of her only son by giving him away in adoption, against her will. Now, if there be active opposition by the mother, then the question arises, is the father permitted by the Hindu law to perpetrate the iniquity?

The question must be answered in the negative as well according to the principles of equity and justice, as according to the true construction of Hindu law. It should be borne in mind that the commentaries were composed when slavery which is recognized by Hindu law, was in force; and that the Hindu law of personal status has to a certain extent been modified by the law abolishing slavery in India. A Hindu father can no longer claim to possess dominion over his children, which he could transfer to another person agreeably to the provisions of Hindu law. It should further be observed that the transfer of dominion, though it might confer upon the transferee full power over the person of the son and reduce him to the position of a slave, did not extinguish the son's natural relationship with the parents, nor cut off the religious ties with which he was connected with his ancestors. We have seen that all the comment rs agree in laying down the principal alternative to be the concurrence of h parents in making the gift when both are alive and present, but some think to be absolutely necessary for a valid gift; others may be taken to consider it reqr te in a religious point of view; while the rest, to regard it as simply desir e.

But it should be remembered that the father's right of giving a son, independently of that son's mother, is rested by Jagannátha, on the ancient theory of his *patria potestas*. That learned author's view, that the mother's assent is absolutely necessary for the purpose of a valid gift in adoption, appears to be the most reasonable one, seeing that the effect of such gift is to sever the natural connection with the mother both for temporal and religious purposes. The Dattaka-Mímánsá appears to maintain that for religious purposes, the assent of the wife is requisite to enable the husband to make a gift of their son in adoption. The distinction which is founded on the nature of the father's predominant right based upon the *patria potestas* seems to be now obsolete, and "the validity of an adoption is determined by spiritual rather than temporal considerations."[1] The proper view to take, therefore, seems to be that the father alone is incompetent to give when the mother is opposed to it, and that such gift is not void but voidable only at the instance of the mother.

It should be observed that there is no analogy between the adoption of a son by the husband alone, and the gift of a son by him, without the consent of the wife. A husband may have a son apart from one of his wives, and is also competent alone to adopt a son who is to continue his lineage and to take his inheritance. But the gift of a son affects the son's mother, and has the effect of cutting off the ties between the mother and the son. The one is positively injurious, while the other is a perfectly harmless transaction, so far as the wife is concerned.

The question has not as yet arisen in any case, but Mr. Mayne observes,—"It is quite settled that the father alone has absolute authority to dispose of his son in adoption, even without the consent of his wife, though her consent is generally sought and obtained."[2] The learned author's conclusion is based upon what is stated on this subject in the commentaries, referred to above, and upon two cases which, though not bearing on the point, may justify an inference to that effect. In one case[3] it was held that the husband alone may adopt without the consent of the wife. In the other[4] a widow adopted a son on an express agreement by the natural father of the boy, before she accepted him in adoption that she should remain entitled to her husband's estate for her life, subject to the boy's maintenance and so forth; and the question was, whether the natural father's agreement was binding upon the adopted son? The court held that it was, and in support of that view, made the following observation,

[1] *Sri Virada Pratapa Raghunada Deo* v. *Sri Brojo Kishoro Patta Deo*, I. L. R., 1 Mad 32.)

[2] Mayne's Hindu Law and Usage, § 120.

[3] *Alank Manjari* v. *Fakir Chand Sarkar*, 5 Beng. Select Reports, 418 (356.)

[4] *Chitko Raghunáth Rájádiksh* v. *Jánaki*, 11, Bom. H. C. Reports, 199 (202.)

"Besides, it is a fallacy to suppose that, for the purpose of giving in adoption, the power of a father is only co-extensive with the power of a guardian. In the eye of Hindu Law, when a man gives his son in adoption, he would seem to exercise a power, more like the power of an absolute proprietor than that of a guardian." This is quite true, but has not the law curtailed that power in all other respects? If that be so, then an adoption also cannot now be viewed in its old aspect.

**Gift by the mother.**—The parental property in a child being common to both the father and the mother, the right of making a gift of the child must vest in both, therefore one cannot give without the consent of the other. According to the ancient law, however, the father had, in addition to the natural right, the *patria potestas*, and the mother's status was similar to that of a minor wanting discretion; hence the father could exercise the right of gift independently of the mother, who could not exercise such right unless her want of discretion were supplied by the assent of her husband: this appears to be the substance of Vasishtha's text. In any view of the law, the wife is competent to give her son in adoption, when her husband is alive and capable of giving his consent, only with his assent.

But if the husband is dead or permanently absent or has renounced the world, or lost his reason, without giving his assent, then, according to the strict rule propounded by Vasishtha, the wife would be incompetent to give her son in adoption. The condition of the husband's assent, however, is not so strictly construed with respect to the gift, as with respect to the acceptance, of a son in adoption. The reason is obvious, for the power of giving her son in adoption which is an advancement of the child, may be safely entrusted to the mother who would be induced to part with her son only in distressed circumstances. The commentators concede this power, as we have already seen, because other sages recognize the independent right of the mother to give; and they explain away the necessity of the husband's assent as propounded by Vasishtha, by saying that it may be presumed; in fact they limit the operation of that text to the case when the husband is alive and present and is capable of giving his assent. But this must necessarily be the rule independent of that text when the child belongs to both parents who must therefore join in making the gift. It may be observed here that Vasishtha does, at first, recognize the equal capacity of both parents, and then adds the rule that a woman should not give except with her husband's assent. Now, according to the rule of construction adopted by Sanskrit commentators, the second rule may be taken as laid down either by way of exception (पर्युदास) or by way of recommendation (प्रसज्य-प्रतिषेध); and the commentators who maintain the widowed mother's power of giving a son without her husband's consent, take the latter view. It is now settled that if the husband be dead or permanently absent or incapable of giving his consent, the wife also is

competent to give her son without the husband's express assent.[1] Accordingly it has been held that when the father is insane and unable to give his consent, the mother alone can give her son in adoption.[2]

Although acceptance and gift in adoption by a woman are not placed on the same level, and the express permission of her husband is not considered necessary to validate a gift in adoption by a widow of their son, yet a woman is supposed to act even in giving as a *delegate* of her husband, and is held to be incompetent to give her son in adoption against the will of her deceased husband, expressed or implied, or gathered from the circumstances of the case.[3] Similarly, it is held that a mother cannot give her only son in adoption even as a *Dvyámushyáyana* without express authority previously obtained from her deceased husband,[4] as such gift would be injurious to the spiritual interests of her deceased husband.[5]

It should be observed that the Dattaka-Mímánsa and the Dattaka Chandrika maintain the capacity of a widow to give her son in adoption, not so much upon the presumed assent of the husband, as upon her independent right to give, recognized by Manu and other sages. Jagannatha, however, maintains that the husband's assent is absolutely necessary for a gift by the wife, and his authority is greatly respected by the Southern Schools. Accordingly the principle of the widow's dependence has been invoked in Madras as a means of controlling her power to give in adoption, and it was ruled that in the absence of express assent from the husband, a mother may give her younger son in adoption with the consent of his kinsmen.[6]

**Distress.**—Manu[7] and Kátyáyana[8] ordain that a son should be given during a season of distress such as famine. This does not appear to be a rule of law, but a mere statement of what actually takes place in the usual course of things. Except when the giver and adopter are near relations, none but persons in needy and indigent circumstances are found disposed to part with their sons by giving them in adoption. It is universally admitted that a gift in adoption is perfectly valid though made otherwise than under pressure of want; the giver only becomes guilty of sin by reason of transgressing the above rule.[9] By some, a

[1] *Tarini Charan* v. *Sarada Sundari Dasi*, 11 W. R., 408; 3 B. L. R., A. C. J., 145; *Bhalabai* v. *Vithola* 7 Bom. H. C. R., App. 26.

[2] *Hurrasoondree Dasse*, v. *Chundermoney Dassee* Sevestre's Reports, 938.

[3] *Rangubai* v. *Bhagirthibai*, I. L. R., 2 Bom., 377.

[4] *Debee Dial* v. *Hurhor Sing*, 4 Beng. Sel. Rep., 320.

[5] *Lakshmáppá* v. *Rámává*, 12 Bom. H. C. R., 364: *Somasekhara Raja* v. *Subhadra Maji*' I. L. R., 6 Bom., 524.

[6] *Arnachettum Pillay* v. *Jyasamy Pillay*, 1 Mad. S. D. A. R., 154.

[7] Manu IX, 168.

[8] Dattaka-Mim., 4, 19. [9] Dat. Mim. 4, 20; Mitákshará, 1, 11, 10;

strained interpretation is put upon the expression "during distress" by making it refer to the adopter's distress consisting in his want of male issue.[1]

The injunction that the gift of a son is proper in a religious point of view when made during a season of distress, should be borne in mind to understand the character of some other rules which I shall discuss later on. Kátyáyana ordains,—"But during a season of distress, the gift or sale even, should be made (कर्तव्यं); otherwise, he must not attempt the same: this is the injunction of holy institutes."[2] Suppose that a widow with her only son has no means of subsistence, but a man is willing to take the son in adoption, and there is no other alternative for the boy than either death by starvation or gift in adoption, then is the Hindu law to be construed to prevent the widowed mother from giving the son in adoption?

**Parents only have power to give, they cannot delegate it.**—According to ancient law a man could exercise *patria potestas* not only over all his children but also over all his agnatic descendants; and if gift in adoption were taken to be an act in the exercise of that power, then the paternal grandfather also could make a valid gift of his son's son in adoption. But a gift in adoption can no longer, as I have already told you, be viewed in that light: it must now be regarded simply as the transfer of parental interest in the son, which may be made only by the parents and no other. Accordingly it has been held that when the father is dead and the mother living, she is the only person who can give in adoption, the Hindu law does not authorize the paternal grandfather or any other person to give away a boy in adoption.[3]

In particular cases the advantages to the boy by the adoption may no doubt lead one to take a favourable view of the gift in adoption by the eldest brother who is represented in some passages of law as alike to the father, or by any other near relation; and accordingly in one case in Madras it was held that the consent of a brother, as representing his deceased father, to the adoption of his brother was sufficient, the consent of the mother who did not attend being presumed.[4] But this view was not taken in a similar Bengal case[5] in which the adoption was held to be invalid. Such power is liable to very great abuse, and the above ruling is not approved.[6]

A gift in adoption to be valid in law, therefore, must be made only by the natural father or mother of the son given, or by them both conjointly. They cannot jointly or severally delegate that authority to another person, so as to

[1] Dat. Mim. 4, 21; Kullaka's gloss on Manu IX, 168.

[2] Dat. Mim. 4, 19.

[3] *Collector of Surat* v. *Dhirsingji Waghbaji*, 10 Bom. H. C. R., 235.

[4] *Virapermal Pillay* v. *Narrain Pillay*, 1 Strange's Reports, 91.

[5] *Mt. Taramonee Dibia* v. *Dev Narayun Rai*, 3 Bengal Sel. Rep, 516 (387.)

[6] *Muttasawmy Naidu* v. *Lutchmeedevamma*, Mad. S. D. A. R. 1852, p. 96.

validate a gift by him after they are both deceased. Hence, a gift in adoption by the brother of the adopted after the decease of his father and mother, though made with the previous assent of his father, was held to be invalid.[1] Gift in adoption is attended with such serious consequences on the prospects of the boy given, that the power cannot be safely entrusted to any other than the parents. And as no gift is complete until the thing be actually delivered, the discretion which the parents alone may exercise in the matter can be evidenced only by the actual gift; the previous expression of consent is merely a promise to give which is liable to be revoked at any time, and is quite ineffectual in law.[2] Hence the law declines to sanction the delegation of the power by the parents to another person to be exercised after their death.

It should be observed that all that the law requires is that the secular act of gift should be completed by the father or mother, but the physical act of giving the child in the religious ceremony of adoption may be vicariously performed by a delegate. Accordingly when the father died after making the gift, and the ceremonial giving was done by a brother of the adoptee, the adoption was held to be valid.[3] So also where a mother allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid.[4]

**Assent of the son.**—There are some texts from which it may be argued that the assent of the son given is necessary for a valid gift in adoption; thus Kátyáyana ordains,—"A wife, or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested; he must keep them himself: but in extreme necessity, he may give or sell them; otherwise, he must attempt no such thing; this has been settled in codes of law."[5] But as sons are given in adoption when infants and incapable of giving or withholding assent, and as adoptions are always beneficial to the adoptee, the question as to the validity of adoption being affected by want of the son's consent has never been raised nor is likely to arise. Besides, when the unrestricted power of parents to give in adoption is recognized by all the other sages, the rule propounded by Kátyáyana should properly be construed to be one of moral obligation only. But if the boy is sufficiently old to have intelligence and a will of his own, and is opposed to his severance from his natural family, then it is not likely that the adopter would be disposed to adopt him, and it is doubtful whether the courts will maintain the validity of an adoption if it is impeached

[1] *Bashettiappa Bin Baslingappa* v. *Shivlingappa Bin Ballappa*, 10 Bom. H. C. R., 268.
[2] *Gourbullab* v. *Jugernatpersaud Mitter*, Macn. Cons. H. L., 217.
[3] *Venkata* v. *Subhadra*, I. L. R., 7 Mad., 548.
[4] *Vijiarangam* v. *Lakshuman*, 8 Bom. H. C. R., O. C. J., 244.
[5] Colebrooke's Digest Book II, Ch. IV, Sect. 1, Verse 7.

by the adoptee himself. The assent of the boy (or man) may be considered necessary in Bombay[1] where even a married man may be given in adoption.[2]

**Assent of relatives.**—The ceremonial of adoption requires that the kinsmen should be invited,[3] and the object of the invitation is explained to be that they may witness the adoption.[4] But in another place[5] Nanda Pandita puts a different interpretation upon it: he maintains that the forefathers of the adoptive mother only, become the maternal grandsires of the adopted son,[6] and he refutes the position advanced by Hemádri, namely, that the adopted son must offer funeral oblations to his natural maternal ancestors,—by relying upon Manu's text,[7]—"Of him, who has given away his son, the obsequies fail"; and by arguing that the maternal grandsires are also parties to the gift by reason of their affording assent to the same, as appears from the passage,—"having convened his kindred."[8] The conclusion is not open to objection if the premises be true. But what will be the consequences if the maternal grandfather of the boy expressly dissents from the gift? Then it must be admitted that neither his right to the religious services from the boy, nor his natural relationship with him, will be affected by the gift in adoption, made without his consent. The commentators are not agreed on this point, as appears from the discussion itself; the adoption, however, would be valid even without such consent though not a perfect one as regards the adoptive mother. This was one of the reasons for which it was held until recently that an adopted son is not entitled to inherit from his adoptive mother's relations.

Nanda Pandita's argument, however, seems to be defective; for if the father's gift cuts off the connection of the son with his natural paternal grandsires, the same result would follow from the mother's gift. If the assent of the paternal grandsires is not necessary, then why should that of the maternal grandfather be requisite. The correct view appears to be that the gift by both parents or by either of them has the effect of extinguishing the natural connection for all legal purposes, excepting marriage. The existence and the consequent consanguineal connection of a child are due to the joint action of the parents who in the eye of Hindu law, form one person; they have therefore jointly as well as severally the power of putting an end to that connection, and the law recognises such power. Hence it would appear that the consent of relatives is not at all necessary for the validity of the gift of a son by the parents.

[1] Steele's Law and Customs, 385.

[2] *Nathaji Krishnaji* v. *Hari Jagoji*, 8 Bom. H. C. R., A. C., 67; *Lakshmappa* v. *Rs.* 6, 12 Bom. H. C. R., 364; *Dharma Dagu* v. *Ramkrishna Chimnaji*, I. L. R. 10 Bom., 80.

[3] Dat. Mím. 5, 8.

[4] *Idem*, 5, 9.

[5] *Idem*. 6, 51.

[6] Dat. Mim. 6, 50.

[7] Manu, IX, 142.

[8] Dat. Mim. 5, 31.

**Assent of the King.**—All the sages that deal with the ceremonies of adoption provide that notice of the adoption should be given to the king.[1] From which it may be inferred that assent of the Government is also necessary. It should be borne in mind that in India most of the offices under the Hindu kings were hereditary, and it is not unlikely that an officer intending to continue his lineage by adoption must obtain the sanction of the king, so that the son adopted by him might be recognized by the king as his successor in the office whereupon the prestige of the family depended. Accordingly the Poona castes informed Mr. Steele that the consent of the Sircar was necessary to adoptions by Wuttundars.[2] The Dattaka-Mímánsá says that the word 'king' in the above passages signifies the lord of the village,[3] apparently with a view that the object of inviting, or giving notice to, the king's representative in the village, is to give publicity to the transaction. The assent of the king, however, has never been thought essential for the validity either of the gift or of the acceptance of a son in adoption.

**Can an adopted son be given away in adoption.**—It is therefore clear that the father and the mother only are competent jointly or severally to give away their son in adoption, and that the assent of any other person is not necessary. Now, the question naturally suggests itself, can the adoptive parents give away the adopted son in adoption? If adoption at the present day were viewed, in the light of the ancient *patria potestas*, as a transfer of dominion over the son, then undoubtedly the adoptive father after having acquired that dominion, could transfer the same to some other person, just in the same way as he can transfer any other chattel. But I have already told you that adoptions can no longer be looked upon in that aspect; a gift in adoption must now be considered to be a transfer of such rights as the natural parents with their relations may legally and religiously have over their real son, so as to vest them all in the adoptive parents and their relations. Vasishtha and Baudháyana expressly predicate, of the natural parents, the competency to give their son in adoption, and set forth the ground upon which the power is founded. And if you construe the texts of other sages, declaring that the father or the mother may give their son in adoption, according to the well-known canon of construction which says that the words in a precept are to be taken in their primary and not secondary senses[4] then you arrive at the same result; for the words "father," "mother" and "son" in these passages must be taken in their primary sense of natural parents and real legitimate son[5] respectively; there is, therefore, no authority in Hindu law for supporting the vilidity of the gift in adoption of an adopted son by the adoptive parents.

Equity also is opposed to such gift by the adoptive parents; for, the natural

[1] Dat. Mim. V, 4, 31 and 42. [2] Steele's Law and Customs, 183.
[3] Dat. Mim. V, 5-6. [4] Dat. Mim. 6, 28. [5] Dat. Mim. 2, 40.

safeguards of love and affection, which may be relied upon in the case of the real parents for presuming that the power of giving in adoption will be exercised for the benefit of the son, are wanting in the adoptive parents, who may sometimes be rather desirous of getting rid of the adopted son, especially when a son is born to them.

For these reasons the gift in adoption of an adopted son, appears to be unauthorised.

**Gift of the first-born, or youngest, or one of two, or an only, son.**— There are certain passages of law and sacred literature, which expressly or impliedly intimate that a man should not give his eldest or youngest or an only son in adoption, nor should one having only two sons, part with either of *them* by giving him away. As to the gift of the youngest son, there is no Smriti text, but the Vedik story of Sunahsepha may be taken to indicate a prohibition; for, *it* relates that Sunahsepha the second son was given, because the first son being dearest to the father, and the third and youngest being so to the mother, could not be given.[1] The commentators say nothing about the youngest son. But Mr. Steele says that a youngest son ought not to be given in adoption;[2] that appears to have been the view of some Pundit on caste questioned by him. We may, however, dismiss the case of the gift of the youngest son from further consideration, as it appears to be universally admitted that the gift of such son is not liable to any exception. As regards the others, there are passages of law, referred to by the commentators, which expressly or by implication prohibit *the* gift of them in adoption. And although it is now settled that the prohibitions relating to the gift of others than an only son are rules of mere moral *obligation*, and not intended to invalidate an adoption, yet in order to understand the character of any one of these prohibitory rules, it is necessary to examine and discuss all of them inasmuch as they appear to be founded on the selfsame principle, and to be of the same description, so that all of them must stand or fall together. Let us, first of all, consider the passages of law bearing on this subject.

**Rishi texts on the gift of the first-born, one of two, or an only, son.**— With respect to the eldest son, Manu declares,—"By the eldest son, as soon as born, a man becomes the father of male issue, and discharges his debt to his *pitris* or progenitors. That son alone, by whose birth he discharges his debt (to his forefathers,) and through whom he attains immortality was begotten from a sense of duty. Let the first-born support his younger brothers; and let *them* behave to the eldest, according to law, as children (should behave) to their father. The first-born, (if virtuous,) exalts the family, or, (if vicious,) dest it: the first-born, is in this world the most respectable; and the good never t him with disdain."[3]

[1] See Lecture V, *Supra*, page 181. [2] Steele's L. & C., 45 and 183. [3] Manu, IX, 10

From this passage it follows by necessary implication that a father is incompetent in a religious point of view, to give away his first-born son in adoption. For, it is by means of the first-born son, that he discharges the obligation to his progenitors which attached to him from his birth,[1] and it would be allowing him to cheat the ancestors, if he were permitted to give away that son over whom he cannot be said to have further control so as to sever his connection with the ancestors, continuation of whose lineage was the debt discharged by means of that son. In a religious point of view, the argument is undoubtedly very strong against the gift of the first-born son. There is, however, no express passage of law prohibiting the gift of the first-born, excepting one cited by a recent writer[2] without mentioning the author, namely, **न ज्येष्ठपुत्रं दद्यात्**, "The first-born son shall (or should) not be given."

As to the gift of the only son Vasishtha and Baudháyana ordain,—"A son produced by the virile seed and the uterine blood is an effect whereof the mother and the father are the cause; the mother and the father therefore are competent to give, sell or abandon him: but an only son shall (or should) not be given *nor accepted* for he is to continue the line of the ancestors: a woman shall (or should) not give *or accept* a son except with the assent of her husband.

Leaving out of consideration the italicized words which relate to the acceptance of a son in adoption, and which contain a rule not relevant to the present enquiry, you will find on examining the above passage that it contains three rules bearing on the subject: (1) the unqualified power of the parents to give all their sons without any distinction, for the principle assigned for the recognition of the power applies to all sons alike without any distinction; (2) the prohibition of the gift of an only son, for which a reason has been assigned; (3) the prohibition of the gift by a woman without her husband's consent, apparently based upon the ground of woman's want of independent discretion: you should observe that the latter two prohibiting rules are in opposition to the general affirmative rule first laid down. We have already seen that the third rule which qualifies women's capacity to give has not been construed to be one of strict legal obligation, and we may leave it aside as it is not relevant to our present subject. The second rule which forbids the gift of an only son deserves especial attention in the present connection. I may tell you here that, according to the well-known method followed by Sanskrit commentators in construing two rules connected like the first and the second rule laid down in the above passage, the second rule m r be interpreted in two ways, namely, either as forming an absolute and in erative exception to the first, or as one incapable of curtailing and controlling th operation of the first and general rule which is equally authoritative with it,

[1] Lecture V, *Supra*, page 205.

[2] Author of the Dattaka-Dídhiti; see Pundit Bharat C. Siromani's Dattaka-Siromani, p 128.

but intended merely as a recommendation on religious ground; in the words of the Sanskrit commentators, either as a पर्युदास or as a प्रसज्य-प्रतिषेध। you should further bear in mind that the above precept prohibiting the gift of an only son, sets forth the reason for the rule.

With respect to the gift of an only son and one of two sons, *Saunaka* says,—"By no man having an only son, *should* (कर्तव्यम्) the gift of the son *be* ever *made;* by a man having (बहु) *three* or more sons *should* (कर्तव्यम्) the gift of a son *be* carefully *made.*"[1] It should be observed that this passage does not expressly prohibit the gift of a son by a person having two sons; but such a prohibition may be inferred, because it forbids the gift of an only son, and permits the gift of a son by a person having बहु *three* or more sons. You should bear in mind that in the Sanskrit language and grammar there are three numbers, namely, singular, dual and plural, and that the word *bahu* बहु means the plural; therefore the word *bahu-puttrena* बहुपुत्रेण in this text means "by one having *three* or more sons" and not "by one having *two* or more sons." It follows therefore from this text, by implication, that a man having only two sons is not permitted to give away one of them. I have used the word *should* in the above translation, because the word used in the original is *kartavyam* कर्तव्यम् It is I think desirable to cite here the original of the whole text;—

नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन।
बहुपुत्रेण कर्तव्यं पुत्रदानं प्रयत्नतः॥

**Observations on the above passages.**—For the purpose of considering the character of the above restrictions, it should be borne in mind that all the sages including Vasishtha and Baudháyana, have, while describing the twelve kinds of sons, defined the sons given, bought and deserted to be those *given*, sold and abandoned respectively by the parents. These definitions are founded upon the assumption of the absolute power of the parents to dispose of their *sons* in the three ways. Barring the general disapprobation of gifts of wives and sons, no other restriction relating to the exercise of the power is laid down by the sages other than Vasishtha and Baudháyana who also admit the power of the parents in that behalf, but forbid its exercise over an only son on religious ground. Now what we have to consider is, whether this restriction is intended as merely recommendatory (प्रसज्य-प्रतिषेध) or as imperative (पर्युदास). The precept says that an only son is not to be given, because he is to continue the line of the ancestors; therefore according to the authoritative rule of construing the sacred law, propounded by Jaimini, this precept must be taken to be recommendatory, since it sets forth the reason for the rule.[2]

You must also arrive at the same conclusion if you examine the character of the precept by the applicability or otherwise of the doctrine of *Factum valet*

[1] Dat. Mím. 4, 1.

[2] Lecture IV, *Supra*, page 152.

to the same. I have already discussed[1] the principles upon which that doctrine rests, according to which the rule cannot but be taken to be one of religious obligation only. For, if you once admit that the parents have property in their child, which they are competent to transfer by sale, gift and so forth, and then prohibit a transfer of such property having regard to an extraneous circumstance, you simply lay down a rule of religious obligation, which cannot invalidate a transfer made in spite of it; for the fact (or more properly, the nature of the thing, *i. e.*, the parental property, or the transfer of the same) cannot he altered by a hundred (such) texts." It is a prohibition of the same kind as that forbidding the alienation by a man of his self-acquired property without the consent of his sons,[2] and that prohibiting the alienation of a man's whole property.[3] The man transgressing the precept commits sin, but the validity of the transaction is not thereby affected.

This view gains considerable support from Saunaka's text, in which two rules are laid down, namely, (1) gift of an only son *should* not *be made* (कर्तव्यम्) (2) gift of a son *should be made* (कर्तव्यम्) by a man having three sons. In the first place the word *kartavyam* indicates the rules to be recommendatory, for I have already told you that according to the high authority of the founder of the Bengal School, the word *kartavya* in a precept shows that it prescribes a religious and not a civil duty.[4] The comparison of the two rules expressed in similar language, and connected with each other, proves the same thing. For you cannot hold the second rule to be of legal obligation, so as to compel a man having three sons to give one in adoption, then why should the first rule be considered to be of a different character: why should you compel a man to retain his only son to himself?

Besides, it should be specially observed that the above rule is laid down by these three sages while they are dealing with the religious ceremony of adoption, and giving prominence to the religious aspect of the institution, as distinguished from its civil aspect.

I ought to tell you here that the only ground upon which the precept ordained by Vasishtha and Baudháyana may be argued to contain a पर्युदास or an imperative rule by way of an exception to the general rule relating to the capacity of the parents to give, is, that it prohibits not only the *gift* but also the *acceptance* of an only son. But it should be observed that if the gift of a thing is only prohibited, there is also an implied prohibition of its acceptance; hence the express prohibition of acceptance does not alter the nature of the rule which evidently affects the religious duty and prospects of the giver only. That is the view taken by most commentators who do not attach any importance to the words relating to acceptance. The utmost that can be said is, that it is not

[1] Lecture IV, pages 146 *et seq.*
[2] Dayabhaga II, 29 & 30.
[3] Dayabhaga, II, 22—26.
[4] Lecture IV, page 152.

perfectly religious for the adopter to accept such a son, and this view is entertained by a few commentators who, however, do not appear to think that the rule affects the civil aspect of the adoption of an only son.

Let us see how the commentators have understood the above texts of the sages. However much they recommend the observance of the above rules, they appear to consider the rules to be of religious obligation only, and not as invalidating an adoption made in contravention of them. The commentaries, however, seem to be misunderstood on this point, either in consequence of the vagueness of the rendering, or on account of mistranslation due to carelessness or made intentionally for the purpose of embodying the translator's own view on the matter. With these remarks I now proceed to place before you, how the commentators deal with the above passages of law.

**Mitákshará.**—The authority of the Mitákshará is universally respected throughout India, except in Bengal where it yields to the Dáyabhága in those points in which the latter lays down any different rule. The founder of the Bengal School, however, is entirely silent on the point under consideration, hence the rule contained in the Mitákshará on the present subject may be taken to be accepted as authoritative everywhere in India. It may also be very reasonably argued from the omission on the part of Jímútaváhana, to take notice of the above texts of the sages, that he considered them to be of no value in a legal point of view.

Referring to Manu's text describing the adopted son, the Mitákshará says[1]:—

"By specifying distress, it is intimated, that the son *should not be given* unless there be distress. This prohibition regards the giver.

"*Similarly*, an only son *should not be given*. For Vasishtha ordains,—'Let no man give or accept an only son'

"*Similarly*, though more than one son exist, the first-born son *should not be given;* for he chiefly fulfils the office of a son, as is shown by the following text of Manu,—'By the first-born son, as soon as born, a man becomes the father of male issue.'"

Here there are three prohibitions expressed in the same words (*na deyah* न देयः), and the next in order is connected with the preceding one by the word *similarly* (तथा)[2] showing that the three rules are of the same kind. Now, the

[1] These passages correspond to Colebrooke's Mitákshará Ch. 1, Sect. 1, paragraphs 10, 11 and 12. The original is as follows:—

आपद्-ग्रहणाद्-अनापदि न देयः। दातुरयं प्रतिषेधः।
तथा, एकपुत्रो न देयः। न ह्येवैकं पुत्रं दद्यात् प्रतिगृह्णीयाद् वेति वसिष्ठस्मरणात्।
तथा, अनेक-पुत्र-सद्भावेऽपि ज्येष्ठो न देयः। ज्येष्ठेन जातमात्रेण पुत्रो भवति मानव इति तस्यैव पुत्र-कार्य-करत्व श्रवणात्।

[2] तथा = तेन प्रकारेण = *in the same manner*: : प्रकारवचने थाल्। Pánini 5, 3, 23.

first rule is undoubtedly one of moral obligation, for it expressly says that the prohibition regards the giver, and necessarily implies that it does not regard the taker, and therefore the gift is valid in law. It follows therefore that the second prohibition is also a rule of the same character as the first, for in no other respect can there he a *similarity* between them. And for the same reason, the third rule also must be of the same description.

It should further be observed that although Vasishtha's text prohibiting both the gift and the *acceptance* of an only son is cited in support of the position that an only son should not be *given*, the author of the Mitákshará does not allude to the prohibition of the *acceptance*. He must therefore be taken to attach no importance to it, in other words, he does not prohibit the *acceptance* of an only son in adoption. The rule of construing these commentaries is, that you are not to consider what rule may be deduced from the passages of law cited in them, but you must confine your attention to the propositions which their authors themselves lay down, and for supporting which the passages are quoted.

How these works are to be construed, has been pointed out by the Judicial Committee, while considering the following passage of the Dáyábhága,[1]—"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it. Thus Kátyáyana says,—'Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her death let the heirs take it.'"

As to the construction of this passage Sir Barnes Peacock observes,[2]—"They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words 'preserving unsullied the bed of her lord,' nor the words 'and abiding with her venerable protector,' import conditions involving a forfeiture of the widow's vested estate; but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider, is not so much what inference can be drawn from the words of Katyáyana's text taken by itself, as what are the conclusions which the author of the Dáyabhága has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindu commentators have often drawn opposite conclusions."

Let us now see the force of the expression *na deyah* (न देयः) rendered into "should not be given," according to the Mitákshará itself. I have already told you[3] that, whilst dealing with the topic of litigation called, Revocation of Gift,

[1] XI, I, 56. [2] *Moniram Kolita* v. *Keri Kolitani*, I. L. R., 5 Calc., 776 (785.)

[3] Lecture IV, *Supra*, page 151.

the Mitákshará divides gifts into four kinds, namely, *deya* (देय) or what should be given, *a-deya* (अदेय) or non-*deya* or what should not be given, *datta* (दत्त) or what is legally given, and *a-datta* (अदत्त) or non-*datta* or what is deemed *ungiven* or invalid gift. One of the texts of Yájnavalkya on that subject is as follows,—"Property should be given (*deya*) but not so as to put the family to distress,—except a wife or a son; but not the whole of the estate where there is issue living, nor what has been promised to another." While commenting upon this text the Mitákshará[1] says,—"This is said with the intention that these *should not be given* (*a-deyah*), but not with the intention that there is absence of property; for, property exists in a son, a wife, the whole of one's estate, and what has been promised to another." The things that are enumerated as not *deya* show that the gift is improper but not invalid.

It should further be remarked, that regard being had to the language and the context of the Mitákshará, if you say that the first and the third rule, namely, those relating to the gift in distress and to the gift of the first-born son are not imperative but merely preceptive, then you are bound to pronounce the second rule prohibiting the gift of an only son to bear the same character.

Colebrooke has rendered the above passages of the Mitákshará in the following way,—

10. By specifying distress, it is intimated, that the son *should* not be given unless there be distress. This prohibition regards the giver (*not the taker*).

11. So an only son *must* not be given (*nor accepted*). For Vasishtha ordains "Let no man give or accept an only son."

12. Nor, though a numerous progeny exist, *should* an eldest son be given; &c.

He has incorporated with the text the words in the parenthesis, from Bálambhatta's commentary. In his notes on paragraph 10, he cites the following gloss of Bálambhatta,—"If he gave away his son when in no distress, the blame attaches to him, not to the taker"; and in that on paragraph 11, the following gloss of the same commentator's,—"nor should such a son (an only son) be accepted. The blame attaches both to the giver and to the taker, if they do so."

The learned translator seems to have thought that this gloss justified him in rendering the rule respecting the gift of an only son, in the way he has done. But with great deference to him, who is justly respected as the highest authority on Hindu law, I may observe that his conclusion is not supported by the gloss of the commentator, for all that Bálambhatta says, is that blame attaches both to the giver and to the taker, if they do so. He contemplates actual gift

[1] Sanskrit Mitákshará, Bombay Edition of 1887, page 225.

and acceptance in adoption, which are not pronounced invalid, but the parties to it are only blamed: surely this is not sufficient to justify the inference that the adoption is invalid. It should be borne in mind that a transaction may be perfectly valid in law, however blameable, reprehensible or sinful it may be represented.

Pundits, however, understand the above passages of the Mitákshará in the way I have pointed out.[1]

**Vaijayantí.**—Nanda Pundita in this earlier work of his, in continuation of the portion already cited,[2] goes on to say thus:—"In distress" means, in famine and the like. The prohibition regards the giver, if the gift be made while there is no distress. Or, the word 'distress,' may mean, the adopter's distress consisting in his want of male issue, because Atri says,—'By a sonless man alone, a substitute of son, should always be made.' But if the adopter has already a son, then the prohibition regards him alone (not the giver).

"An only son should not be given, because Vasishtha ordains,—'Let an only son be neither given nor accepted.'

"Similarly, the first-born also (should not be given,) for there is an indication to that effect, in the Vedik story of Sunahsepha, which says that the father refused to give the first-born son.[3]

"Excepting a fraternal nephew (who whether the first-born or an only son may be given,) because it will be shown that he bears the character of son to all the brothers."

The view of the law, taken in the above passages, appears to be the same as in the Mitákshará.

**Dattaka-Mímánsá.**—In his later work, Nanda Pundita discusses the subject in the following passages:[4]—

1. "Now in reply to the question, as to what kind of son shall (or should) be affiliated, Saunaka declares,—"By no man having an only son, (*eka-puttrena,*) *should* the gift of a son *be* ever *made:* by a man having *three* or more sons, (*bahu-puttrena,*) the gift of a son *should* at a time of great anxiety, *be made,* (*kartavyam.*)"[5]

2. "He, who has only one son, is *eka-puttrah,* by him the gift of that son shall (or should) not be made: for, Vasishtha ordains,—'But an only son, (one) shall (or should) neither give nor take.'

3. "Since, the word 'gift,' in the text, means the causing of another person's property by the previous extinction of one's own property; and since the causing of another person's property is impossible without that person's acceptance;

[1] *Mhálsábaí* v. *Vithoha,* 7 Bom. H. C. R., App., XXVI (XXX.)

[2] *Supra,* p. 271.

[3] Max Müller's Ancient Sanskrit Literature, page 413.

[4] Dattaka-Mímánsá, IV, 1-8, and 18-20.

[5] Lecture IV, page 152.

(it follows therefore that the author) censures (प्रतिषेधति) also that (*i. e.*, acceptance); therefore, also a prohibition of acceptance is established by this very text. Accordingly Vasishtha says,—'But an only son, one shall (or should) neither give nor accept.'

4. "Of this, he declares the reason,—'For, he is to continue the line of the ancestors.' By the declaration of the continuation of the lineage being the object of the prohibition, is implied the *sin*[1] of extinction of lineage, in the gift of an only son; and this (sin) is incurred even by both the giver and the acceptor. For, the declaration follows both (the prohibitions, namely, of gift and of acceptance of an only son.)

5. "As for another text of Smriti,—'In instruction, the father has control over his son and wives; but he has no control over his son so as to sell or give him,' and the text of Yájnavalkya,—'(Property &c.) *should be given* excepting a wife and a son': these texts relate to an only son.

6. "'Ever' (in the text of Saunaka, means) in a time of calamity; accordingly, Nárada says,—'The sages declare that a deposit, a son, and a wife, the whole of a man's estate when he has issue living, and joint property are (*a-deyáni*) what *should not be given* even by a man oppressed by grievous calamities.' This text also regards an only son, because it is to be taken to contain the same rule as is declared by Vasishtha and Saunaka.

7. "In reply to the question,—By whom then *should* a son *be given*, Saunaka says, by one who is *bahu-putrah* or a man having *three* or more sons.

8. "The prohibition (contained in the first line of Saunaka's text) being that 'by no man having an only son, *should* the gift of a son *be* ever *made*,'—the gift of a son, even by one having two sons, could be made (being unaffected by that prohibition); it is for the purpose of prohibiting such gift, also by a man having two sons, that Saunaka has declared,—'By a man having *three* or more sons *should* the gift of a son *be* anxiously *made*.'—For, the speech of Sántanu to Bhíshma, expresses,—"Oh descendant of Kuru, he, who has an only son is, considered by me, as one destitute of male issue. One, who has only one eye, is, as one destitute of both; for, should his only eye be lost, he would be absolutely blind."

18. "Then also (*i. e.*, when the gift of a son may otherwise be properly made) Saunaka declares the occasion (for the gift),—'at a time of great anxiety,' that is, in a season of distress; (19) hence, the meaning is, that a gift of a son (should be made) in a time of calamity only, not otherwise. Thus Kátyáyana says,—'But in a season of distress, the gift or sale even should be made; otherwise he should not attempt the same. This is settled in the codes of law.' From the context, the gift or sale, is to be understood to relate to 'a son'

[1] The original word प्रत्यवाय means, *sin*, not an *offence* or *crime*.

and wives.' Manu also says,—'He, whom his father or mother *give* during distress &c."

20. "'Distress means famine and so forth; should the gift be made when there is no distress, the giver commits sin, by reason of the prohibition, 'otherwise he should not attempt the same.'"

In this connection, the following passage in another part of the work should also be taken into consideration,—"The capacity to give, consists in having *three* or more sons (त्रय-पुत्रता), and in the assent of the wife."[1]

**Nanda Pandita's views** deserve special attention as his Dattaka-Mímánsá has been accepted by the Courts as a work of paramount authority on questions of adoption. In his earlier work he prohibits the *gift* of an only son, and of the first-born son, as well as the gift of a son in the absence of distress. In the Dattaka-Mímánsá, he says nothing about the gift of the first-born son, but he declares that the gift of an only son, of one of two sons, and of a son in the absence of calamity, are prohibited by the sages. In both the works he says that the prohibition against the gift of a son in the absence of distress regards the giver who commits sin by making the gift. As regards an only son, the gift only is prohibited in the first work, but in the second treatise both gift and acceptance are declared to be sinful. It should be noticed that in the first treatise the prohibition against the gift of an only son and that against the gift of the first-born son, are represented to be rules of the same character. Let us, however, confine our attention to what is said in the Dattaka-Mimánsá, the production of the author's maturer understanding.

It is a very important circumstance in connection with these rules, that Nanda Pandita nowhere says that an adoption made in contravention of them is invalid or ineffectual. This would not have been entitled to much weight if Nanda Pandita had not thought it necessary to make an express declaration to that effect in other places. For instance, after having dealt with the prescribed formalities for adoption, Nanda Pandita concludes by saying,—"It is therefore established, that the filial relation of adopted sons, is occasioned only, by the ceremonies. Of gift, acceptance, burnt sacrifice, and so forth, should either be wanting, *the filial relation even fails.*"[2] It is worthy of notice, that with respect to the adoption of an only son, the author simply says, "sin is incurred by both the *giver* and the *taker*," therefore he contemplates a case in which the gift and the acceptance have been completed, but says nothing about the validity or otherwise of the transaction, apart from what may be inferred from his opinion that the persons concerned in it commit sin.

You may therefore take all the rules to be obligatory on the ground that they have been laid down by the author; or you may consider them all to be

[1] Dat. Mím. 5, 14. [2] Dat. Mim. 5, 56.

recommendatory, as he does not pronounce any of them to have the effect of invalidating an adoption; or you may differentiate between them according to your view of the reasons assigned by the author in discussing the different cases. But if you proceed to examine the reasons for that purpose, then you are also bound to consider their cogency as well.

It may be, and it has been, said that the prohibition against the gift of a son in the absence of distress, as well as that against the gift of one of two sons, or of the first-born son, are directed against the giver who alone commits sin by such gift, and not against the taker; and the sin of the giver does not vitiate the transaction: but by the adoption of an only son, both the giver and the taker have been declared by Nanda Pandita to be guilty of the sin of causing extinction of lineage, therefore it is either the sin of the taker, or the cumulative sin of both the giver and the taker, that must be taken to justify the conclusion that the transaction itself is vitiated. But such an inference as this is not supported by the two leading treatises of paramount authority; for, according to the Mitákshará[1] as well as to the Dáyabhága[2] a sinful thing may be perfectly lawful; the sin attaches to the person but does not vitiate the transaction.[3]

Besides, if the adoption of an only son were not valid in law but *ab initio* void, there could be no real gift and acceptance, and no sin could be incurred by the so-called giver and acceptor who were parties only to the mechanical giving and taking. When you say that a man commits sin by the gift or the acceptance of a thing, you use these words in their ordinary sense of extinguishing or creating a right to the thing; and if such right is not affected in any way there is neither gift nor acceptance, how then can sin be committed by the persons concerned in the sham transaction? Hence from Nanda Pandita's argument you cannot but draw the inference that the adoption of an only son must be valid in law.

The meaning of Nanda Pandita's observation that the adopter incurs the sin of extinction of lineage by taking an only son, has also been misunderstood. What Nanda Pandita says is, that by the gift in adoption of an only son the giver's lineage becomes extinct, and this is due to the adoption consisting in the gift and the acceptance, that is to say, to the joint action of the giver and the adopter, therefore the sin of causing the extinction of the giver's lineage attaches to both the giver and the adopter. It can by no means be supposed that the adopter's participation in the sin of causing the extinction of lineage, intends that, notwithstanding the adoption, the adopter is to be deemed to have no lineage. But this view appears to have been taken in a case[4] in which it is

[1] Mitákshará, 1, 1, 10; Víramitrodáya, pp. 38 *et seq.*

[2] Dáyabhága, II, 28-31.

[3] Lecture III, *supra*, pp. 88-89.

[4] *Rajah Opendar Lall Roy* v. *Ranee Bromo Moyee*, 10 W. R., 347 (348.)

observed,—"Now, the perpetuation of lineage is the chief object of adoption under the Hindoo law; and if the adoptive father incurs the offence of 'extinction of lineage' by adopting a child who is the only son of his father, the object of adoption necessarily fails." This proves that it is difficult to apprehend the real meaning of the author from the English translation of his work. I may give you another instance of misapprehension arising from vague rendering: Mr. Sutherland uses the word 'offence'[1] for *pratyavâya* which means *sin* or religious offence, but not a civil *offence* or *crime*;[2] but it seems that this word has contributed to the view that the adoption of an only son is a civil offence. So also, in the above case the Court relied upon the words *must not be given*[3] used by the translator with respect to an only son, for holding that the rule is imperative. If that be the force of the words then every sonless Hindu must legally be compelled to adopt, for Atri's text has been rendered thus,[4]—"By a man destitute of a son only, *must* a substitute for the same, always *be made*."

Now, let us see how far the reasons assigned by Nanda Pandita are cogent. Why should there be an extinction of lineage by the gift of an only son? The giver may have a son born to him after the gift of his only son, or he may adopt one; in fact, so long as the giver himself is alive the lineage of his ancestors is not extinct, and when he is capable of providing for the continuation of his lineage, the argument based upon extinction of lineage is of no weight at all.

Upon a careful consideration of all the passages bearing upon the question, the conclusion to which you must come, is that Nanda Pandita discusses the subject in a religious point of view, and does not intend to imply that an adoption is invalid if made in contravention of the above rule. This is the view entertained by all learned, orthodox and *bonâ fide* Pundits whose opinion, not being given in any pending case, is not open to suspicion and is entitled to the greatest weight.[5]

In the present connection, it is necessary to notice an important distinction in doctrine between the Mitákshará and the Dáyabhága School, with respect to gift. The founder of the Bengal School maintains[6] that "in the case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient being"; and he argues that acceptance by the donee is not necessary for the completion of the

[1] Dat. Mím. 4, 4.

[2] See Sir F. Macnaghten's Cons. on H. L., page 147.

[3] Dat. Mim, 4, 2.

[4] Dat. Mím. 1, 3.

[5] See the opinion of the late venerable Pandit Bharatchandra Siromani, Professor of Smriti in the Government Sanskrit College of Calcutta, in the Bengali Synopsis annexed to his annotated edition of the Dattaka-Mímánsá and the Dattaka-Chandriká, published for the benefit of his pupils, in 1860 A. D.

[6] Dáyabhága, I, 21.

gift.[1] His view appears to be that the right of the donee arises from the relinquishment of the donor, but if the donee refuses to take, his non-acceptance extinguishes that right. This doctrine is noticed and criticized by the author of the Víramitrodaya,[2] who maintains that the acceptance by the donee is the *sine qua non* of a gift; for, without it, no gift is complete. It should be observed that Nanda Pandita is a writer of the Mitákshará school, and his exposition of Vasishtha's prohibition of the acceptance of an only son, is based upon the assumption that acceptance by the donee is absolutely necessary for the completion of a gift. According to the Bengal doctrine of gift, that part of Vasishtha's text must be taken to create neither a civil nor a religious duty, but to be simply laudatory of a man's non-acceptance which would prevent another person from transgressing a religious duty.

**The Dattaka-Chandriká** deals with the above texts in the following way. The author first lays down the proposition that a brother's sons if available for adoption, must be adopted in preference to all others.[3] Then he notices an objection to it, *viz.*, if you say that a brother's son must be adopted, how is that possible if he is the only son of his father, when Vasishtha prohibits his adoption.[4] And obviates it by saying that the text of Vasishtha applies to a case other than a *dvyámushyáyana* adoption (in which the adopter becomes the son of two fathers, namely, the natural and the adopting;) for, the extinction of lineage, set forth in that precept containing the reason of the rule, would not take place in the said form of adoption.[5]

Then the author introduces the present subject, thus,—In answer to the question,—by whom should a son be given? Saunaka declares—'By no man having an only son, should the gift of a son be ever made: by a man having three or more sons, should the gift of a son be anxiously made.' The sage, apprehending the extinction of lineage in case of the other son's death, if gift of one son be made by a man having two sons, has declared,—'by a man having three or more sons &c.'"[6]

It should be noticed that in this work which is composed by a Bengal lawyer, the acceptance of an only son is not prohibited except by implication.

**The Dattaka-Nirnaya** is a treatise composed by Srínatha Bhatta, a lawyer of the Bengal School. This work on adoption is noticed by Sir F. Macnaghten.[7] This author expressly says that the adoption of an only son or the first-born son though blameable is not invalid; the following is the translation of the passage dealing with the present question:—

"Next, the law relating to the gift and acceptance of a son is considered

[1] Dáyabhágá, I, 22-24.
[2] Pages 31 *et seq.*
[3] Dattaka-Chandriká, 1, 20 *et seq.*
[4] *Idem.* 1, 27.
[5] Dattaka-Chandriká, 1, 28.
[6] *Idem.* 1, 29-30.
[7] Considerations on Hindoo Law, page 122.

On this, Vasishtha says—(he cites the whole text of Vasishtha, already cited). In this text, the prohibition of the gift of an only son is mentioned for the purpose of showing that sin is incurred by so doing, and not for the purpose of showing that the gift is invalid. * * * Similarly also the gift of the first-born son is prohibited; for Manu says—'By the first-born, as soon as born, a man becomes father of male issue,' therefore the donation of the first-born son is attended with great sin."[1]

You should observe that this commentator appears to intimate that the sin is greater in the gift of the first-born son than in that of an only son. But I may here remark that Nílakantha is of opinion that there is no precept prohibiting the gift of the first-born son.[2]

**Jagannátha says**—"Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct: but this does not invalidate the adoption of such a son actually given to him."[3]

**Conclusion deducible from commentaries.**—The foregoing examination of the subject as dealt with by the commentaries shows that although the prohibitions are noticed by them, none of them declare an adoption made in contravention of the rules to be invalid; in fact most of them do not apply their mind to the question as to what would be the effect of such an adoption: whilst those that have dealt with that question unhesitatingly pronounce that such an adoption if made would be valid in law.

And this appears to accord best with reason: for, take the case of adoption of an only son; if such an adoption be pronounced invalid in law, the decision must be founded upon the principle that a man is *legally* bound to have a son, therefore the gift of an only son being the breach of a legal duty would not be permitted by law. Then, consistently with this doctrine, you must go the extent of legally compelling all sonless persons to provide themselves with sons. You cannot avoid this consequence except by holding that to have or not to have a son is a matter that should be left to the conscience of the people, as being one falling beyond the legitimate range of legal obligation.

I have already told you that as a general rule, poor men only are found in this part of Hindustan to give away their sons in adoption; the usage in Bombay may be different.[4] Now suppose a poor man having an only son has no means of subsistence and is unable to provide his son with maintenance. Is death of the child by starvation to be preferred to his adoption? I am not aware of any authority in Hindu law, to the effect that the death of a person

[1] Pundit Bharat C. Siromoni's Dattaka-Siromani, page 121; Sir F. Macnaghten's Cons. of H. L. page 125.

[2] Mandalik's Vyavahára-Mayukha, p. 51.

[3] Colebrooke's Digest, Book V, verse 273; Madras Edition, Vol. II, page 387.

[4] West and Buhler, p. 1075.

as a member of the family of his birth secures any spiritual benefit to his ancestors.

It should further be observed that a man confers spiritual benefits upon his ancestors by performing the Sráddha and the like ceremonies, the celebration of which entails expenditure of wealth. And we all know very well that the majority of the people do, seldom if ever, perform these ceremonies, being not in a position for affording to pay the necessary expenses therefor.

You should also bear in mind, what I have already told you, namely, that according to the principles of the Hindu religion the possession of a son is not necessary for the salvation of a man. If your knowledge of the Hindu religion consists in what you gather only from what is said in the two treatises on adoption, you may no doubt entertain a contrary idea. But even then, you cannot compel a man to be religious against his will.

The conclusion, therefore, seems to be irresistible that the above prohibitions are not intended by any commentator to be such as may be legally enforced.[1]

**European authorities.**—Let us now proceed to see how the law on the subject has been understood by the European authorities and our courts of justice. The fact that these prohibitions are set forth in the books, and the applicability of the doctrine of *factum valet* to rules of that description, have caused a difference of opinion amongst European authorities.

Colebrooke's opinion is against the validity of the adoption of an only son; it is entirely founded upon the Mitákshará ch. I, sect. XI, paragraph 11.[2] But we have already seen that his translation of that paragraph is not correct.

Sutherland is of opinion that an only son cannot become an absolutely adopted son, but he may be affiliated as a *dvyámushyáyana*, or son of two fathers.[3] He does not appear, however, as it seems from his translation, to have carefully considered the legal meaning of some of the words used in the original. But it should be remarked that he does not declare such an adoption to be invalid.

Sir Francis Macnaghten appears to consider the question from the religious aspect.[4] He says that "the gift of an only son is considered to be an inexpiable *piacle*." He is, on that account, unable to accept the view that an only son *may be given*,—maintained in the Dattaka-Nirnaya.[5] He observes,—"The *crime* of giving an eldest son, has never been considered so heinous, as that of giving an *only* son"; and criticizes the contrary opinion expressed by Sir Thomas Strange in *Veerapermal* v. *Narain Pillay*.

[1] See Rao Saheb Visvanath Mandlik's learned disquisition on the subject, in the Appendix to his edition of Mayúkha, pp. 496 *et seq.*

[2] 2 Strange's H. L., p. 107.

[3] Synopsis, Head Second.

[4] Considerations on Hindu Law, page 1[illegible].

[5] Cited in *Idem*, p. 126.

On the other hand Sir Thomas Strange,[1] Mr. Ellis[2] and Sir W. Macnaghten[3] consider the prohibitions to be of moral obligation. The former is of opinion that the prohibition relating to an eldest and an only son are *directory* only; "and an adoption of either, however blameable in the giver, would nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet, quod fieri non debuit.*" Mr. Ellis observes, "that if the act be duly completed, it cannot he reversed." While Sir W. Macnaghten says,—"the party adopted should neither be the only nor the eldest son"; he refers, in the note appended to this text, to the passages of Manu and Vasishtha, as well as to the exposition of them given in the Dattaka-Nirnaya, and observes, "but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. But it may seem that subsequently the learned author changed his view, for in his note to two cases cited in the second volume of his work[4] in which a contrary view was taken with respect to the adoption of an only son, he observes,—"but, in fact, the prohibitory injunction applies as well to the giving as to the receiving; the giver of an only son being considered as parting not only with the sole means of evading eternal torment *himself*, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect." The learned author failed to see that the consequence contemplated would happen only if the giver were to die simultaneously with the gift of his only son.

It may be remarked here that the opinion of several of the above authorities are based upon earlier decisions of the Courts to which I shall presently refer.

In concluding this notice of European authorities, I may cite the opinion of Dr. Wilson an eminent Sanscrit scholar, who, though not a lawyer himself, was, by reason of his official connection with the Sanskrit College of Calcutta, in a position to form a correct opinion upon the point. He observes as follows in his critical examination of Sir F. Macnaghten's work on Hindoo law,—"In rule 8th, Sir F. M. lays it down, that the gift of an only son is absolutely prohibited, acknowledging, however, that an only son may be so given, the donor being content to suffer the consequences. These consequences relate to his condition after life, and no Hindu will very readily incur them. The evil, however, is only to the perpetrator, and as the measure does not affect the peace or well-

[1] 1 Strange's H. L., 87.
[2] 2 Strange's H. L., 107.
[3] See 1 W. Macn., p. 67, and note.
[4] 2 W. Macn., pp. 178-179.

being of society, it seems rather superfluous to have legislated upon the subject except that it gives the learned judge an opportunity of impugning an extra-judicial opinion of the Recorder of Madras. Sir F. M. has not adverted here to the allowable arrangement, by which a case of the kind is provided for, and an only son, though not absolutely given in adoption, may be affiliated as the son of two fathers—fulfilling the double capacity of a son to his natural, as well as to his adoptive father."[1]

**Case-law declares prohibitions respecting first-born son and one of two sons to be directory.**—Let us now proceed to consider how the law has been understood by our courts. As regards the rules forbidding the adoption of the first-born son and one of two sons, the European authorities that have considered them appear to view them as dissuasive and not peremptory.[2] There are some cases in which the opinion of Pandits was against the adoption of the first-born son;[3] but it is now settled that such adoption though blameable is valid in law.[4] It should be remarked that the prohibition is against the *gift* of the first-born son and not of an elder son, although the latter expression is used by European writers.

**Case-law,—adoption of an only son valid in Madras, N. W. Provinces, and the Punjab.**—The validity of the adoption of an only son was first raised in the Tanjore case (*ex relatione Veerapermall* v. *Narrain Pillay* decided by Sir Thomas Strange as Recorder of Madras in 1801,)[5] in which Pundits of the different provinces were consulted by the Supreme Government, and the adoption was held to be valid. The following extract cited by Mr. Mayne[6] from the Recorder's judgment will show the view taken by the Pundits:—

"The opinion of the present Pandits of Bengal is, 'that a person who has only one son should not give him away; nor should he give away an elder son: the adoption of an only son indeed is valid, but both the giver and receiver are blameable.' This appears to have been settled in the instance of the Rajah of Tanjore. In that important case the person adopted was the only son of his parents; and it is a mistake if any one imagines that the deviation from the rule on that occasion was supported upon any ground of Mahratta custom or policy. The objection appears to have undergone deep consideration, conducted

[1] Dr. Wilson's Works Vol. V, page 56.

[2] 1 Strange's H. L., 85; 1 W. Macnaghten, pp. 67 and 77; 2 W. Macn. pp. 178 and 179 and note.

[3] *Permaul Naicken* v. *Pottee Ammal*, Mad. S. D. A. D. of 1851, p. 234.

[4] *Seetaram* v. *Dhunnook Dharee*; 1 Hay's Reports, 260; *Janokee Debea* v. *Gopaul Acha ea*, I. L. R., 2 Calc., 365; *Kashibai* v. *Tatia*, I. L. R., 7 Bom., 221; *Jamnabai* v. *Raychand N al-chand*, *Idem.*, 225.

[5] 1 Strange's notes of cases, page 91.

[6] Mayne's H. L., § 133.

in part through the fortunate medium of Sir W. Jones; and certainly in a way to evince the anxiety of Government to be rightly advised. It appears that the Pandits of Bengal and Benares in general were of opinion that 'in all countries the affiliation of an only son is valid, although the parent who gives the child, and the adopter, both incur sin by deviating from the ordinances of the *shaster* which declare the giving or taking of an only son in adoption to be improper.' Ramavana indeed, and the other Pandits who sign with him, state 'that an only son could not be given to the Rajah to adopt as his son.' But it appears that they rather mean that the act could not be done consistently with the ordinances of the *shaster*, than that the adoption was invalid, for they expressly state that 'several usages had been adopted and followed, that are not found in the *Shaster*, and are to be looked upon as valid.' This exposition was considered at the time as reconciling their opinion with that of Kashinauth and the other Benares Pandits, who stated 'that the adoption of an only son is one of those acts, which are tolerated by usage, although it incurs guilt according to the *Shaster*.' These testimonies corroborating the opinion of the Tanjore Pandits, transmitted by the widow of the Rajah Tulsajee, and those received through the Government of Fort St. George, decided the Supreme Government that the objection that Serfojee was an only son was not sufficiently founded to invalidate his adoption and succession."

The Recorder expressed the same opinion as is contained in his treatise on Hindu law; and his opinion has all along been followed by the Madras Courts.[1] The Allahabad High Court have adopted the same view and have held by applying the doctrine of *factum valet* that an adoption of an only son is valid in law, though improper;[2] Turner, J. one of the judges, however, dissented from that view.

The same view is also taken by the Punjab Chief Court,[3] and it is said that such adoption is valid by the custom of the Punjab. The real fact is, that the Punjab having come under British dominion later than the other provinces, has been fortunately saved from the consequences of the mistake committed by the European authorities in thinking that the two special treatises on adoption contain rules by which the Hindus are actually governed. At first there was an attempt to apply those rules to the Punjabis, and it was held in one case that the adoption of an only son was not valid.[4] But an enquiry into the actual cus-

[1] *Arunáchallam Pillai* v. *Ayyasvami Pillai*, 1 Madras Select Decisions, p. 156; *Chinna Gaundan* v. *Kumára Gaundan*, 1 Mad. H. C. R., 54, followed in I. L. R., 11 Mad., 43.

[2] *Hanuman Tiwari* v. *Chirai* I. L. R., 2 All., 164.

[3] *Hari Sing* v. *Gulaba* Punjab Records, 1874, 183; *Sardar Diwan Sing* v. *Musst. Subbon*, *Idem.*, 1878, p. 233; *Hoshiney* v. *Jaimal Sing*, *Idem.*, 1881, p. 135; *Taba* v. *Sibchurn*, *Idem.*, 1883, p. 506; *Hukum Singh* v. *Mungul Sing*, *Idem.*, 1886, p. 82; *Gandee Mull* v. *Musst. Rudhi Idem* 1886, p. 119.

[4] *Teja Sing* v. *Sochet Sing*, Punjab Records, 1872, p. 73.

toms of the people has convinced both the Government and the Courts that in matters of adoption, the innovations introduced by Nanda Pandita and other recent commentators, are not found to exist in practice. The truth is, as I have already told you, that those restrictions were nowhere followed, nor even known to the people.

**Adoption of an only son was valid in Bengal and Bombay down to 1868.**—The decisions in Bengal have fluctuated between the two views. In 1816 the Pandits gave their opinion that the adoption of an only son could be valid if he was given and accepted on condition that he should be the son of two fathers, namely, the giver and the adopter.[1] But nothing turned upon that question as the decision was rested upon the ground that the adoption was bad, inasmuch as it had been made by the widow without the express permission of her husband. In 1824 it was held upon the opinion of the Pundits that according to the law current in Behar the adoption of an only son was invalid.[2] In that case a review was granted on the ground that the Pandit who gave the opinion, upon which the decision was based, had taken a bribe to give a favourable answer. But the original decision was confirmed as the fresh opinion taken showed that his exposition of law was correct. One of the judges, however, was of opinion that the adoption was not invalid though improper; but the other two judges took a different view.[3] In 1828 the gift by a widowed mother of her only son without authority previously given by her deceased husband was pronounced invalid.[4]

You should bear in mind that between 1824 and 1829 the three treatises of the European text-writers were published, which rendered the judges to a certain extent independent of the opinion of the Pandits. Subsequently in 1838 the same question arose for decision in a case before the Supreme Court, which was heard by three learned judges, who held that the adoption of an only son was valid in law. The following is the short judgment of the Court delivered by Sir Edward Ryan C. J.[5]:—

"The Bill prays amongst other things that one Colly-coomar may be adopted. It has been found upon the issue that there was a direction to adopt. The defendant's counsel has objected, first that Colly-coomar is the only son of his father, and secondly, that the initiatory ceremonies, and particularly tonsure, ought to be performed in the adoptive father's house. On the first point, the adoption of an only son is no doubt blameable by Hindu law, but when done it is valid. We entertain therefore no doubt as to the first point, and think that

[1] *Raja Shumshere Mull* v. *Ranee Dilraj Konwur*, 2 Bengal Sel. Reps., p. 216 (189.)

[2] *Nundram* v. *Kashee Pande*, 3 Beng. Sel. Reps., 310 (232.)

[3] *Nundram* v. *Kashee Pande*, 4 Beng. Sel. Rep., 89 (70.)

[4] *Debee Dial* v. *Hur Hor Sing*, 4 Beng. Sel. Rep., 407 (320.)

[5] *Sreemutty Joymonee Dassee* v. *Sreemoty Sibasoondry Dassee*, Foulton's Rep., p. 75.

Colly-coomar may be adopted. Parties having two modes of doing the same thing the Court will not suppose that the party has adopted that one which is immoral and blameable. The agreement between the adoptive and natural father may be for him to become Dvyámushyáyana, or son to both fathers. We think in this case that Colly-coomar may have been thus adopted, and if so he will have been adopted without blame. Upon the second point, as to the ceremony of tonsure having been performed in the house of the natural father, it is no bar to the adoption; for after performance, a sacrifice to fire, even amongst the three first classes may be resorted to, and this will undo its effects. But in this case the parties are Shúdras and there is no ceremony but marriage for them."

In 1864, the principle laid down by Ryan C. J. was followed by the High Court[1] and it was held that the adoption by a Sudra of an only son as *Kurta putro* was not illegal. Although it may be said that it was not a case relating to Dattaka adoption, yet it did not turn upon that distinction, for the Court observed,—"though it is allowed that a father should not give up his eldest or an only son for adoption by another, we are not shown any authority on the illegality of such selection when once made and acted upon."

The same view of the law was also taken in Bombay. In 1821 the Pandits of the Court of Sudder Adawlut gave their opinion that the gift, by a man having two sons, of both of them in adoption was valid.[2] And in 1862 and 1867 the same view was taken by the High Court, and it was held that an adoption of an only son though improper was not invalid if made.[3]

**Dvyámushyáyana adoption of an only son.**—It should be observed that Sir Edward Ryan maintains the validity of the adoption of an only son upon two grounds: first, the doctrine of *factum valet*, for he says that such adoption "is no doubt blameable by Hindoo law, but when done it is valid"; second, the presumption of Dvyámushyáyana mode of adoption in such a case, then such adoption would even cease to be blameable. It is no doubt true that we find it stated that an express stipulation to that effect is necessary between the giver and the receiver of an only son, in order that he may be a son of both. This is doubtless what may be expected in the ordinary course of things. But it would be a mistake to suppose that a special contract is absolutely necessary to constitute a child, the son of two fathers; for, the necessity of the case would justify the presumption of an implied agreement to that effect, and there is abundant authority in Hindu law for supporting the view taken by the Chief

[1] *Mussamut Tikdey* v. *Lalla Hureelall*, W. R., Gap number, p. 133.

[2] *Huebut Rao* v. *Govindrao*, 2 Borrodaile's Reports, p. 83 (75.)

[3] *Mhalsabái* v. *Vithoba Khandappa* 7 Bom. H. C. R., App. XXVI; *Raje Vyankatráv Anandráv Nimbálkar* v. *Jayavantráv*, 4 Bom. H. C. R., A. C. J., 191.

Justice.[1] I shall return to this subject when I come to the formalities for adoption. Hence the only objection that can be urged on religious grounds against the adoption of an only son, is obviated by the supposition of an implied agreement that the only son would belong to both the giver and the receiver who must be presumed to be aware of the law by which they are governed.

**Since 1868 the law has been held in Bengal to be against the validity of an only son's adoption.**—Thirty years after the adoption of an only son had been declared valid by Sir Edward Ryan, C.J. and two other learned judges of the Supreme Court, the same question again arose before a Division Bench of the Calcutta High Court, but it was held that the adoption of an only son was invalid. The grounds upon which the conclusion is based will appear from the following judgment upon the point, delivered by Justice Dwarkanath Mitter:[2]—

"It appears that the plaintiff was the only son of his natural father, and as the adoption of an only son is contrary to the Hindu Law, the title set up by the plaintiff must necessarily fail. That the adoption of an only son is prohibited by the Hindu Shastras, is beyond all controversy. The two leading authorities on the subject, namely, the Dattaka-Mimansa and the Dattaka-Chandrika, are unanimous in declaring that such an adoption should never be made:—

'By no man having an only son (eka-putra), is the gift of a son to be ever made.' Dattaka-Mimansa, section 4, verse 1.

"He who has an only son, or one having an only son, the gift of that son *must never be made*. For as Vasishtha declares, 'an only son let no man give.' Therefore, a prohibition against acceptance is established by the text in question. Accordingly Vasishtha says, 'let no man give or accept &c.' (Ditto, verse 2.)

"To this he subjoins a reason. 'For he is destined to continue the line of his ancestors.' His being intended for lineage being thus ordained: in the gift of an only son, the offence of extinction of lineage is implied. Now, this is incurred by the giver, and the receiver also.' (Ditto, verse 3.)

"'By no man having an only son is the gift of a son ever to be made.' (Dattaka Chandrika, section 1, verse 2.)

"The passages cited above are sufficient to show that the adoption of an only son is forbidden by the Hindu law. It has been said, that the prohibition contained in these passages amounts to nothing more than a mere religious injunction, and that the violation of such an injunction cannot invalidate the

[1] See Mitákshará ch. I, sect. X, paras. 1-3.

[2] *Rája Upendur Lall Roy* v. *Srimati Rani Prasanna Mayi*, 1 B. L. R., A. C., 221; the case, 10 W. R., 347, *Sub nomine Rajah Opendur Lall Roy* v. *Ranee Bromo Moyee*.

adoption, after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion; and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. 'By a man destitute of male issue only,' says Manu, 'must the substitute for a son of some one description always be anxiously adopted, for the sake of the funeral cake, water, and solemn rites.' It is clear, therefore, that the subject of adoption is inseparable from the Hindu religion itself, and all distinction between religious and legal injunctions must be necessarily inapplicable to it. Suppose, for instance, that a son has been adopted by a childless widow without the permission of her husband, the prohibition against such an adoption is contained in the following passage:—

"'Let not a woman either give or receive a son in adoption, unless with the assent of her husband.' Can it be said that such an adoption would be valid in law? It will be observed that the language employed in the preceding text is precisely similar to that employed in the text prohibiting the adoption of an only son; and it would be difficult to suggest a reason why an adoption invalidated in the one case for temporal purposes, upon considerations arising out of the religious view of the matter, should not be equally invalidated in the other case upon similar grounds. One of the essential requisites of a valid adoption is, that the gift should be made by a competent person, and the Hindu law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the subject of a sale or gift. Such a gift, therefore, would be as much invalid as a gift made by the mother of the child, without the consent of the father. It is to be borne in mind that the prohibition in question is applicable to the giver as well as to the receiver, and both parties are threatened with the offence of 'extinction of lineage,' in case of violation. Now the perpetuation of lineage is the chief object of adoption under the Hindu law; and if the adoptive father incurs the offence of 'extinction of lineage,' by adopting a child who is the only son of his father, the object of the adoption necessarily fails. It is true that the doctrine of *factum valet* is to a certain extent recognized by the lawyers of the Bengal School; but if we were to extend the application of this doctrine to the law of adoption, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *China Gaundan* v. *Kumara Gaundan*, is no doubt in favour of the appellant, but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our presidency which are directly in favour of the view we

have taken, and what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself. The first case is reported in page 178, volume 2, of his work on the Hindu law, and the second is to be found in page 179 of the same volume. We may also observe that the learned translator of the Dattaka-Chandrika and the Dattaka-Mimansa is of the same opinion."

In 1878 this ruling was followed in another case[1] in which it was held that the adoption of an only son is invalid according to the Bengal School of Hindu law, and the prohibition applies as well to Sudras as to the higher castes.

**The opinion of the Bombay High Court has been tending in the same direction since 1868.**—Since 1869 the Bombay High Court have been expressing their opinion approving the Calcutta High Court's decision in Rajah Upendralall's case,[2] when dealing with the widow's competency to give away her only son in adoption without her husband's express permission, or with the gift of an eldest son. From which Mr. Mayne[3] draws the conclusion that the Bombay Court are inclining in favour of the present view entertained in Bengal. The learned author's inference has proved to be correct, for the Bombay High Court have recently declared that an adoption of an only son is invalid by the general Hindu law.[4]

**Observations on this recent view of law.**—The question has not as yet been decided by the Judicial Committee, although there were several cases in which the question was involved, but the decision turned upon some other point.[5] It is remarkable that the Superior Courts of the different provinces of India should entertain opposite views upon a point with respect to which the authorities are accepted to be the same all over India. The recent decision of the Bombay High Court may seem to be open to criticism. For, since the establishment of British Courts in Bombay down to 1868 the law was understood by the Courts to be, that the adoption of an only son was valid. Subsequently the Court expressed their opinion that such adoption was not valid, but it was simply *obiter dictum*. I have already told you that the doctrine of *stare decisis* ought not to be strictly followed in India with respect to Hindu law, where justice is administered by the Superior Courts in a language foreign

[1] *Manick Chunder Dutt* v. *Bhugobutty Dassee* I. L. R., 3 Cal., 443.

[2] *Bháskar Trimbak Achárya* v. *Mohadev Rámji*, 6 Bom. H. C. R., O. C. J., 1 (4); *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., 364; *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377 (379); *Somasekhara* v. *Subhadramaji*, I. L. R. 6 Bom. 524; *Kashibai* v. *Tantia*, I. L. 7 Bom. 221.

[3] Mayne's H. L., § 136.

[4] *Wáman Rághupati Bová* v. *Krishnáji Káshiráj Bová*, I. L. R. 14 Bom. 249.

[5] *Nilmadhab Dass* v. *Bishumbur Das*, 12 W. R., P. C., 29 (31); *Fanindra Deb Rai* v. *Rajeswar Das*, I. L. R. 11 Cal., 463, L. R., 12 I. A., 72.

to the people, and no provision is made for promulgating what is called the judge-made law, amongst the subjects, by publishing the judgments in their language. And if their Lordships had come to the recent conclusion upon the ground that the former view of the law was inaccurate in consequence of the judges having misunderstood the law, by reason of their conclusion being based upon the imperfect materials consisting in the English versions of the commentaries, then they would have been perfectly justified in setting it right upon the basis of a correct view drawn from the Sanskrit sources. They do not, however, base the new theory upon any such reason but rely upon the doctrine of *stare decisis;* for, they upset the former decisions only upon the ground that the High Court had been expressing their opinion for the last twenty years that such adoption was invalid. It follows therefore that the people must shape their conduct agreeably to that opinion, although the law was formerly understood in a contrary way, and the adoption set aside might lawfully take place at the time it was made.

From what I have already observed upon the subject, it is clear that if you were to form an opinion upon what can be gathered from the Sanskrit books on law, that is to say, if the question is decided as one of first impression, there can be but one conclusion, namely, that such adoption is valid.

The Bombay High Court seem to place very great reliance upon the opinion of Justice D. N. Mitter, who was undoubtedly one of the most eminent judges of the Calcutta High Court; but his opinion is vitiated by the erroneous or vague translation of the passages upon which it is founded. His Lordship's expositions of the Hindu law are characterised by too much religiousness such as is not warranted by the Hindu law itself, and are in some cases opposed to its traditional interpretation.[1] As regards the present subject his Lordship's view,—apart from the mistakes due to the imperfect materials and the erroneous conclusion deduced therefrom, which I have already referred to[2]—appears to be that an adoption is essentially a religious institution and therefore the doctrine of *factum valet* is inapplicable to it. But this conclusion does not seem to be supported by Hindu law of the Bengal School, according to which inheritance also is intimately connected with religious rites, and the doctrine would thus be inapplicable to any case. I have already told you that an adoption is rather a temporal than a religious institution, and that the doctrine of *factum valet* as laid down by the founder of the Bengal School does most legitimately apply to rules like the one that prohibits the adoption of an only son, and it has been applied to cases of adoption.[3] Where a transaction is unexcep-

*Guru Govind Shaha Mundul* v. *Ananda Lal Ghose Mazumdar*, 5, B. L. R., 15; 13 W. R., F. ., 49; *Moniram Kolita* v. *Kery Kolitanee*, I. L. R., 5 Calc., 776 (780.) [2] *Supra* page 292.

[1] *Janokee Debea* v. *Gopaul Acharjea*, I. L. R., 2 Calc., 365; *Woonia Daee* v. *Gocoolanund De* , I. L. R., 3 Calc., 587; 2 C. L. R., 51; L. R., 5 I. A., 40.

tionable in a temporal point of view, but is forbidden solely for a spiritual reason, it is the fittest case for the application of the doctrine. The supposed prohibition again is based upon a mere apprehension; for, the extinction of lineage is not the necessary result of the gift in adoption, of an only son, because the giver being alive, he may have a son or sons born to him after the gift, or provide for the continuation of his lineage by adoption. So the natural interpretation of Vasishtha's text is, that by the prohibition he merely intended to remind the giver of his duty to leave a son behind him; at any rate it is certain, that agreeably to the authoritative rule of construing the sacred literature, Vasishtha's precept cannot be taken to embody a positive interdiction.

As for the argument deduced from the condition imposed by Vasishtha's text upon a woman's power of giving or receiving a child in adoption, it should in the first place be observed that that rule is not literally observed at all, because it is universally admitted that a widow may give her son in adoption without her husband's permission, and because a widow may also adopt in Madras, Bombay and the Punjab without any authority from her husband; in the second place, that rule rests on another principle, namely, the absence of independence in women; in the next place, you must confine your attention to the three rules relating to gift, propounded by Vasishtha and leave out of your consideration the acceptance of a son by a woman, so that you may correctly construe those rules of which the two last are in conflict with the first.[1]

**When an only son co-exists with a begotten or adopted son of a predeceased son.**—A son, according to Hindu law, includes a grandson or great-grandson in the male line, therefore the gift of a surviving only son would be perfectly valid when there is a grandson or great-grandson descended from a predeceased son, for in such a case the reason of the prohibition would not apply. And it has been held that the same reason holds good when there is a son adopted by the widow of a predeceased son.[2] This shows forth in a clear light the character of the rule against the adoption of an only son.

**Can two or more persons adopt the same son?**—It is practically unimportant to consider whether two or more persons can jointly adopt one son; for, seldom if ever, would a man be disposed to adopt a son jointly with another person, regard being had to the springs of human action. But if a man may be a son of two fathers, that is, of his natural father as well as of another, there is no reason why one boy cannot be given jointly to two persons. Adoption consists in the transfer of parental property over a child, and its incidents are similar to the transfer of ordinary property. The Hindu law, however, is silent upon the point, and contains no rule one way or the other.

[1] *Supra*, page 283 *et seq.*

[2] *Manick Chand Golecha* v. *Juggut Settani Prankumari Bibi*, I. L. R. 17 Calc., 518.

LECTURE VIII.

## WHO MAY BE TAKEN IN ADOPTION, OR CAPACITY TO BE ADOPTED.

Restrictions relating to the selection of the boy to be adopted—Rules of selection founded upon relationship—Passages of law—Nanda Pandita's exposition of the affirmative rules—The rules held directory—Negative rules of selection based upon relationship—Rules laid down by Nanda Pandita—Incongruity of relationship—"Capability of being begotten by the adopter himself"—Relations intended by Nanda Pandita to be prohibited—Sutherland's marriage-theory—Marriage-theory not supported by Sanskrit writers—The conclusion from Sanskrit works—The incest-theory and the theory of adoption—Incongruous relationship relatively to the adoptive mother—The same in a Sudra adoption—The recommendatory character of the prohibitory rules—Case-law relating to prohibited degrees for adoption amongst twice-born classes—Case-law in Bengal, sister's son, daughter's son, sister's son in Mithila and amongst Káyasthas of Behar, brother, paternal uncle's son, fraternal nephew's son, paternal cousin's grandson—In the Punjab, no prohibited degrees—In Allahabad Nanda Pandita's rule followed—In Bombay the rule followed in recent cases—In Madras daughter's or sister's son may be adopted, but not others—Summary of Case-law—Caste of the boy adopted—Adoption of a disqualified person—Limitation from age and performance of initiatory rites—Case-law on the same—Result of Case-law—Conclusion on the capacity to be adopted.

**Restrictions relating to the selection of the boy to be adopted.**—Besides the prohibitions relating to the adoption of the eldest or an only son, or the like, which I have discussed in the last Lecture and which are founded upon spiritual considerations of the adoptee's natural father, there are certain other rules propounded by Nanda Pandita, restricting the choice of the adopter in selecting the boy to be adopted. With the single exception of one of them, no trace of the others can be found either in the Codes of the rishis that are respected as the compilers of the *Dharma-Sástras*, or in the commentaries that deal with the law of adoption along with inheritance and the other branches of law, and are accepted in all other matters as most authoritative in the different Schools. Most of the rules relating to the fitness of the boy to be adopted are deduced by Nanda Pandita from his own construction of some passages of a few minor Smritis and Puránas of doubtful authority that are not referred to by the commentators on law. The rules thus introduced by him for restraining the choice of the adopter are founded upon a consideration of (1) the relationship subsisting between the adopter and the boy intended to be adopted, (2) the latter's age, (3) his initiatory ceremonies performed in the family of his birth, and (4) his caste.

**Rules of selection founded upon relationship.**—The restrictions governing the choice of a boy for adoption, that are based upon relationship are of two descriptions, namely, positive or negative. The positive rules enjoin a man desirous of adopting a son to select a boy from amongst certain relations of his, in preference to strangers, and further, require that his choice should fall on one of such relations in a specified order, the nearest being preferred to one more remote. The negative or prohibitory rules, on the other hand, forbid him to select a boy for adoption from amongst certain other relations. Both the affirmative as well as the negative precepts appear to embody rules of the same character; and from the manner in which they have been declared in the passages of law, relied upon by Nanda Pandita, you cannot draw any distinction between the two sets of rules, as regards their nature and character, in other words, as regards their being imperative or otherwise.

**Passages of law.**—I shall first place before you the texts of sages, bearing upon the subject. The text of Saunaka deserves special study as his authority is principally invoked by Nanda Pandita in discussing the present subject. I have already told you what the character of Saunaka's work is;[1] while dealing with the religious rite performed on the birth of a child, he does also treat of the ritual of adoption, and the whole of what he says on the subject is contained in the following passages:—

"I, Saunaka, will now declare the best mode of affiliating a son. One to whom no son is born or whose son has died,[2] having fasted (in the day preceding the adoption)[3] for a son, having given two pieces of cloth, a pair of earrings, a turban and a ring for the forefinger to a priest, religiously disposed a worshipper of Vishnu and thoroughly read in the Vedas; having venerated the king and virtuous Bráhmanas by a Madhuparka; having collected the required number of *kusa* grass for kindling sacrificial fire, as well as *Palása* wood for fuel, having earnestly invited the agnate and cognate relations; having entertained the relations and especially *Bráhmanas* with food; having performed the rites, commencing with that of kindling the consecrated fire, and ending with that of clarifying the butter intended as burnt-offering; having advanced before the giver,—should ask him through the priest[4] thus,—'give the son.'—The giver being capable of the gift should give to him with the recitation of the five *rike* commencing with "*Ye Yajnena.*" (The adopter) having taken (the boy) by both hands, with the recitation of the *mantra* or prayer, '*Devasya tvá &c.*'; having repeated the *rik* or Vedik passage "*Angád-angát &c.*"; having smelt the boy in his head, having adorned the boy *bearing the reflection of a son* with clothes and the like; having brought him, accompanied with danc

1 Lecture III, *supra*, page 106.

2 Dattaka-Mímánsá, 1, 4; Dat.-Chand. 2, 1.

3 Dat.-Chand. 2, 2.

4 Dattaka-Mímánsá, 5, 12.

songs and benedictory words within the house; having in the prescribed mode, offered oblation of *charu* to the consecrated fire,—reciting the *rik*, '*Yas tvá hridá &c.*' and the single *rik*, '*Tubhyam agne &c.*,' and the five *riks* commencing with '*Somoadadat &c.*,'—as many times as the number of *riks* recited; and having performed the *homa* or burnt sacrifice with the holy texts, '*Svistakrit &c.*," should complete the remaining part of the ceremony.[1]

"Amongst Bráhmanas, the affiliation of a son *should be made (Kartavyah)* from amongst *sapindas;* or on failure of them a non-*sapinda* (may be affiliated); but any other should not be affiliated: amongst Kshatriyas, one from their own tribe, or one whose *gotra* is the same as that of the adopter's *guru* or preceptor (may be affiliated:) amongst Vaisyas, from amongst those of the Vaisya tribe: amongst Sudras, from amongst those of the Sudra tribe: amongst all classes, from amongst their respective classes, not from others. A daughter's son or a sister's son is, however, affiliated by Sudras; amongst the three (tribes) beginning with the Bráhmana, a sister's son is not affiliated somewhere (or anywhere).[2] By no man having an only son, should the gift of a son be ever made. By a man having three or more sons, the gift of a son should anxiously be made. An excellent Bráhmana should bestow on the officiating priest the fee according to his ability; a Kshatriya, even one half of his dominion; a Vaisya, wealth amounting to three hundred; a Sudra, even the whole of his property: if indigent, to the extent of his means."[3]

Sákala:—"A twice-born man, being destitute of a son, should, on that account, affiliate as a son, the offspring of a *Sapinda*, or also next to him, a child of a *Sagotra;* in default of the latter he should bring up as a son one born in a different *gotra*, except a daughter's son, a sister's son and the son of the mother's sister."[4]

Manu:—"If amongst full brothers, one becomes father of a son, Manu declares that by means of that son all of them become fathers of male issue."—I have already considered the view that may be taken of this passage, namely, that, a man having a nephew need not adopt.[5]

It should be observed that according to the Mitákshará School *sagotra* or agnatic relations are subdivided into *sapindas* and non-*sapindas;* the term *sapinda* is also applied to cognate relations within certain degrees, who are generally designated by the word *bandhu;* but when used without any qualification, *sapinda* includes members of the same family or *gotra*. Therefore, taking

[1] These passages are cited in Dattaka-Chandriká, 2, 1—10; in Dattaka-Mímánsá, 5, 21; and in Vyavahára-Mayúkha, page 52, Mandlik's Edition.

[2] This passage is not found in all copies.

[3] Vyavahára-Mayúkha page 53, Mandlik's Edition; Dattaka-Mímánsá, II, 2, 74; IV, 1: ttaka-Chandriká, I, 10, 17 & 29; II, 14.

[4] Dat.-Mím. 2, 14 and 107; Dat. Chand. 1, 11.

[5] Lecture V, *supra*, page 198.

the passages of Sákala and Saunaka together, it appears that a Bráhmana should adopt a son from amongst those only that are of the same *gotra* with himself; but the other tribes though not enjoined to confine their choice within their own family should nevertheless give preference to one belonging to the same *gotra*. The principle of this provision appears to be that if a person selects his nearest agnatic relation available for adoption, then so far as his agnatic relations are concerned, there cannot be much objection to give the boy adopted the position of the adopter's real legitimate for the purpose of inheritance and so forth. This may be the origin of the doctrine that an adopted son endowed with excellent qualities is entitled to inherit from the adopter's agnatic relations. Nanda Pandita, however, explains the texts in a different manner, to which I shall presently refer.

As regards the negative rules relating to the adoption of a daughter's son and others, you should observe that there is really no rule laid down by Saunaka; his passage bearing upon it is the mere statement of a fact, and does not embody any rule. And as regards Sákala's text it should be noticed that the prohibition of affiliation of a daughter's son and the like, must be a rule of the same character as the injunction regulating the choice of the boy from amongst sapindas and others, to which it forms an exception. That is to say, if you affirm the principal rule to be directory, then you cannot but admit that the exception to it also is admonitory.

**Nanda Pandita's exposition of the affirmative rules.**—Let us now see how Nanda Pandita has construed the above texts, so far as they relate to priority for eligibility for adoption. His conclusion may be summarised thus: a *sapinda* of the same *gotra* is most preferable for adoption; in his default, a *sapinda* of a different *gotra*; on failure of him, a distant relation of the same *gotra*, within the degree of *samánodaka*; on his default a more distant member of the same *gotra*; and on default of such also, one who is neither a *sapinda* nor *sagotra*, but belonging to the same caste, may be adopted.[1] In each group preference is to be given to the nearest, and nearness is determined by the proximity of the common ancestor. From this principle as well as from Manu's text declaring the filial relation of a fraternal nephew to his paternal uncle, he affirms that a fraternal nephew shall (or should) be adopted in preference to all others;[2] and refutes at considerable length[3] the argument based upon Manu's text, that a fraternal nephew becomes a son even without adoption. In this respect he adopts the interpretation put upon the passage by Vijnánesvara,[4] who says that the passage of Manu is intended to forbid the adoption of others if a brother's son can possibly be adopted; it is not intended to declare him so of his uncle.

[1] Dat. Mím. II, 11-20.
[2] *Idem.* II, 28 and 74.
[3] Dat. Mím. II 53-73.
[4] Mitákshará, 1, 11, 36.

The Dattaka-Chandriká adopts the above view both as regards the order of preference,[1] and as regards the brother's son's adoption.[2]

**These rules held to be directory.**—The European authorities are of opinion that the above rules are not imperative but only recommendatory.[3] There is one case, however, in which the Bengal Sudder Court held that according to Hindu law, while a brother's son exists the adoption of any other individual as a son either in the *Dattaka* or *Kritrima* form was illegal.[4] There are other cases in which a contrary view was taken.[5] And it is now settled by the Judicial Committee that these rules are merely directory. The question arose in the case of *Uma Daee* v. *Gokoolanund Dass*[6] in which the validity of the respondent's adoption was impeached upon the ground that his adoptive father had a fraternal nephew capable of adoption, in existence. The question is discussed by the Judicial Committee in the following passages of their judgment:—

"Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil status of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt* v. *Kunhia Singh*, 3 S. D. A. (Select Reports), p. 141. That case arose in a district governed by the Mithila law. The plaintiff claimed under an adoption by his maternal grandfather, not in the Dattaka, but in the Kritrima form, which is recognized by the Mithila law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different Pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note, no doubt says: 'According to the Hindu law, while a brother's son exists, the adoption of any other individual as a son, either in the Dattaka or Kritrima form of adoption, is illegal.' But the force of this note is very much weakened by the fact that Sir William Macnaghten, who, being the editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the

[1] Dat.-Chandriká, I, 10-12.

[2] *Idem.* I, 20-28.

[3] 1 Strange's H. L., 85; 2 Strange's H. L., 104 and 106: 1 W. Macn. 68.

[4] *Ooman Dut* v. *Kunhia Sing* 3 Beng. Sel. Rep., 192 (144).

[5] *Bábáji Jivaji* v. *Bhagírthibái*, 6 Bom. H. C. R., A. C. J., 70; *Dharmádagu* v. *Ram Krishna Chimnáji* I. L. R. 10 Bom., 80.

[6] I. L. R., 3 Calc., 587; L. R., 5 I. A., 40; 2 C. L. R., 51.

passage which will be presently cited. The decision itself was merely on an alleged adoption in the Kritrima form, which, in its inception and consequences, is very distinguishable from one in which the natural father parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the Kritrima form retains his rights of inheritance in his original and natural family.

"The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text writers of eminence. Sir Thomas Strange after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the plaintiff relies, says: 'But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred. And by his references to the cases collected in the second volume he shows that Mr. Colebrooke, and, more strongly, Mr. Ellis, were of his opinion. Again, Sir William Macnaghten, just after referring to the case of Ooman Dutt deals with the question thus, 'It would appear, however, that according to the law of Bengal and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and in the places where the Mimansa principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own sapinda (a brother's son is the first), and failing them to adopt out of one's own gotra, is not essential so as to invalidate the adoption in the event of a departure from the rule.' (Prin. and Prec. of Hindu law, p. 68). It may be further observed that even Mr. Sutherland, in his Synoposis, (see Stoke's Codes, p. 656), says: 'But though Nanda Pandit extends his principle (*i. e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger, when a relative may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law.' It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimansa enjoins is to be taken as imperative and having the force of law, the language

of the 74th article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the articles which affirm the preferential right of the brother's son.

"It was urged at the Bar that the maxim 'quod fieri non debuit factum valet,' though adopted by the Bengal School, is not recognised by other schools, and notably by that of Benares. That it is not recognised by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted not only by the passage already cited from Sir William Macnaghten's work, but by decided cases. The High Court of Madras, in *China Gaundan* v. *Kumara Gaundan*, 1 Madras, 54, and the High Court of Bombay, in a case reported in 4 Bombay, A. C., 191 (*Ráye Vyankatrav Anandraw Nimválkar* v. *Javavantráv bin Mathárráv Ranadive*,') acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta (*Raja Opindur Lall Roy* v. *Ranee Bromomoyee*, 10 W. R., 347; I B. L. R. 221) has refused to give effect to it, considering that particular prohibition to be imperative. Their Lordships felt that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles.

"Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the defendant, even if it were more clearly proved than it is that Hullodhur Das could have adopted Dinobondhoo, the only son of his brother."

**Negative rules of selection based upon relationship.**—Let us now turn to the other branch of the restrictions based upon relationship, regarding the selection of the boy to be adopted, consisting of the prohibitory ones forbidding the adoption of certain relations, which form an exception to the foregoing affirmative rules that have been declared by the Privy Council to be directory only and not imperative.

These restrictions are not only not found in the most authoritative Smritis and in the commentaries anterior to the Dattaka-Mímánsá, but are opposed as I shall show later on, to institutions recognised by them. The texts of the minor Smritis, bearing upon this subject are for the first time, noticed by Nanda Pandita who has laid down certain restrictions. But there appears to be an insurmountable difficulty in understanding whether any general principle of exclusion from the capacity of being adopted, was intended to be laid down by him, and if so, what that principle is. Very great misconception appears to prevail on the subject in consequence of the marriage-theory propounded by Mr. Sutherland the

learned translator of the work; but not only no trace of it could be found in the work itself, it is inconsistent with what Nanda Pandita himself says, as it cannot cover the cases excluded by him. Before proceeding therefore to discuss the character of the restrictions, let us ascertain what are the rules laid down by the author.

**What rules have been laid down by Nanda Pandita?**—The passages of the Dattaka-Mímánsá, in which this subject is discussed are found in two different Sections of the work, namely, in Section II where the author deals with the qualifications of the boy to be adopted, and also in Section V where he deals with the ceremonies of adoption, and incidentally returns to that subject while explaining an expression occurring in the passage of law, bearing upon the subject of the Section.

Let us first see what Nanda Pandita says in Section II; he cites the text of Manu, declaring that if one of several full brothers gets a son, all of them become fathers of male issue by means of that son,—in support of the proposition that a full brother's son if available shall be adopted and no other.[1] Then he adds that as it is established by Manu's text that the full brothers are adopters, it follows that they cannot be adoptees.[2] It means that a paternal uncle of the whole blood cannot be adopted by his nephew, and also that full brothers cannot adopt one another. He goes on to observe that although the word 'brothers' in Manu's text may according to a grammatical rule include sisters, yet from another word *(eka-játa)* which, he argues upon the authority of Vijnánesvara, may be taken in a double sense, it follows that a brother cannot adopt a sister's son, nor a sister a brother's son.[3] In the course of the argument he relies upon this text,—"In the three (superior tribes) beginning with the Bráhmana a sister's son is not affiliated somewhere (or anywhere,)" and attributes it to Vriddha-Gautama, perhaps by mistake, for it is a part of Saunaka's text, already cited.

Thus, he infers from Manu's text four restrictions:—

1. A man cannot adopt his paternal uncle of the whole blood.
2. A man cannot adopt his full brother.
3. A man cannot adopt his full sister's son.
4. A woman cannot adopt her full brother's son.

Later on, he cites[4] the text of Saunaka,—"But a daughter's son or sister's son is made son by Sudras; in the three (superior tribes) beginning with the Bráhmana—a sister's son is not (affiliated) somewhere (or anywhere),"—and discusses[5] at great length its true meaning. His own opinion is that this passage contains an exception to the rule laid down in the previous passage, that

[1] Dat. Mim. II, 29.
[2] *Idem.* II, 30-31.
[3] Dat. Mím. II, 32-35.
[4] *Idem.* II, 74.
[5] Dat. Mím. II, 91-1[illegible]

require the adopter to choose his nearest sapinda,—and it means that the adoption of a daughter's son and a sister's son, though proper for Sudras, is forbidden to the three superior tribes. In support of this view he cites the text of Sákala, which clearly says,—"in default of the latter, he should bring up as a son, one born in a different *gotra* except a daughter's son, a sister's son, and the son of the mother's sister."[1] And concludes[2] his argument, thus,—"By the text of Sákala it is clearly established that the term 'sister's son' in Saunaka's text is illustrative and includes the daughter's son and mother's sister's son: and this is reasonable, because *incongruous relationship*[3] is common to all three."

You may ask the reason as to why Nanda Pandita so strenuously contends by putting a forced construction that the above text of Saunaka intends to forbid the adoption by the twice-born classes, of a daughter's and a sister's son, when there is the clear text of Sákala to that effect? It will appear when you come to Section V, where from that text of Saunaka and from another expression used in a preceding passage by the same author, namely, "bearing the reflection of a son" Nanda Pandita endeavours to squeeze out a rule for the purpose of prohibiting some other relations.

Nanda Pandita in these passages lays down that a man of the twice-born classes cannot adopt (1) his daughter's, (2) or sister's son, (3) or his mother's sister's son. It should be observed that the four rules inferred from Manu's passage apply to all classes without any distinction.

Let us now proceed to examine what Nanda Pandita says in Section V, where he is supposed to lay down a general rule on the subject. I have already told you that in that section the author deals with the ceremonies of adoption; he cites Saunaka's passages prescribing the rites,[4] in which it is provided that after the ceremonies of gift and acceptance have been completed the boy should be brought within the house, and the boy is described by the adjective पुत्र-छाया-वह or *bearing the reflection (likeness or resemblance) of a son.* All that this expression may suggest to the reader of the whole passage of Saunaka is, that the boy who was not the real son of the adopter has now become filially related to him through the rites already described. But Nanda Pandita has explained it in a peculiar way, as will appear from the following passages[5]:—

1. "**Reflection of a son** (means) the resemblance of a son,—and that (consists in) the capability of being begotten by (the adopter) himself through *niyoga* or appointment (to raise issue on another's wife,) and so forth; as

[1] See *supra*, p. 309. [2] Dat. Mím. II, 108.

[3] The original is *Viruddha-Sambandha* विरुद्ध-सम्बन्ध which does not mean "prohibited c nection" into which it is done by Mr. Sutherland.

[4] See *supra*, page 308.

[5] Dat. Mím., V, 16-20: the above translation is somewhat different from that of Suther- l l.

(in the case) of the son of a brother, of a *sapinda*, of a *sagotra*, and of the like.

2. "Nor is *niyoga* or appointment impossible in the case of an unconnected (adopter); for, the invitation (of a stranger to raise issue) may take place, because it is ordained,—'For the sake of seed, let any Bráhmana be invited by wealth.'

3. "Accordingly, a brother, paternal uncle, maternal uncle, daughter's son, sister's son, and the like, are excluded, by reason of absence of the resemblance of a son.

4. "Intending this very (meaning), it is declared by the sage himself in the sequel,—'The daughter's son and the sister's son are ordained to be sons of Sudras;[1] amongst the three superior tribes beginning with the Bráhmana, a sister's son is *nowhere mentioned as a son.*'[2]

5. "In this text also the term 'sister's son' indicates all those not resembling a son; for, *incongruous relationship*[10] is common to them all. And *incongruous relationship*[3] consists in the incapability of being begotten by (the adopter) himself through *niyoga* or the appointment (to raise issue on another's wife,) and so forth.

6. "Just as *incongruous relationship* is excepted also in the Grihya-parisishtha on marriage,[4] thus,—'The marriage of a couple in case of similarity of either of them to the father or the mother of the other, involves *incongruous relationship;* as for instance, a wife's sister's daughter and the paternal uncle's wife's sister.' The meaning of this is this:—Where there is similarity of the couple, that is, of the bride and the bridegroom, to the father or the mother, that is to say, the bridegroom occupies the position of the bride's father, or the bride occupies the position of the bridegroom's mother, such marriage involves *incongruous relationship:* the two examples illustrate the two cases in their order.

7. "Similarly, in the case under consideration, (*i. e.*, in adoption) a son whose *relationship* (before and after adoption) would be *incongruous* should be avoided; in other words such a son should be adopted, as for the mother of whom the adopter may feel sexual love."[5]

[1] This reading is slightly different, See *supra*, pages 309 and 314.

[2] According to Nanda Pandita's own construction, in Sect. II, 93.

[3] 'Prohibited connection' is Sutherland's rendering: the original is विरुद्ध-सम्बन्ध।

[4] Grihya-Parisishta of Asvaláyana, page 284, Asiatic Society's Sanskrit Edition.

[5] Rao Saheb Visvanath Mandlik notices a different reading which he says to be the correct one, namely, यत्र-मातरि नियोगः सम्भवति तादृशः कार्यः meaning, such a son should be adopted, as on whose mother *niyoga* is possible: the reading adopted by Sutherland is रतियोगः सम्भवति तादृशः कार्यः which is rendered by him into "such person to be adopted with the mother of whom, the adopter might have carnal knowledge." But the translation given above by me is more literal.

Let us now proceed to consider the author's meaning and intention as may be gathered from these passages.

From what the author says in Sections II and V, it is clear that he expressly forbids the adoption of (1) full brother,[1] (2) brother (of the half blood,[2]) (3) paternal uncle of the whole blood,[1] (4) paternal uncle (of the half blood), (5) maternal uncle,[2] (6) daughter's son,[3] (7) sister's son,[14] and (8) mother's sister's son.[4]

A woman is likewise prohibited to adopt her full brother's son.

The daughter's or sister's son is not prohibited to Súdras; but whether the others may be adopted by Súdras is not expressly stated.

It should be observed that with the exception of the daughter's, the sister's and the mother's sister's son, the other relations forbidden by Nanda Pandita are not prohibited by any passage of law. It seems to be abhorent to his feelings that a man should adopt as his son any one of those relations. And he applied his mind to deduce some principle and to extract some rule for the purpose of supporting his position that those relations should not be adopted, at any rate by the members of the twice-born classes. Whether he intended to prohibit the adoption of any relation other than those enumerated by him is extremely doubtful. The principles enunciated and the rule suggested by him are so vague and unintelligible that it is difficult to extend them to any other case.

"Incongruity of relationship," and "the capability of being begotten by the adopter himself through an appointment to raise issue on another's wife, *and so forth*," are the two principles with which the author wishes both affirmatively and negatively to give an idea of his rule. Let us see whether we can understand either.

**Incongruity of relationship** with respect to adoption means, the inconsistency of the subsisting relationship of the adopter and the adoptee, with the filial relation of the latter to the former, to be effected by adoption. According to the classificatory system of dividing relations of different degrees into different ranks, necessitated perhaps by the institution of joint family, collateral relations of the same degree of descent from the common stock, with the father are considered as similar to the father; those of one degree higher than the father occupy the position of the grandfather; those that are of the same degree with the man himself are looked upon as brothers; those of one degree lower, hold the position of a son; one lower by two degrees is a grandson, and so forth. It is superfluous for me to say to you that there are shades of difference in the feelings which a Hindu entertains for his relations of different grades, and he is to

[1] Dat. Mím. 2, 31.
[2] *Idem.* 5, 17.
[3] Dat. Mim. II, 91: V, 17.
[4] *Idem.* II, 107-108.

conduct himself in different ways in the presence of his relations of different ranks. Now, it should be observed that if a boy who, agreeably to the above system, already holds the position of a son, such as a brother's or first cousin's son, be adopted, there would be no incongruity between the past and the altered relationship. But the same cannot be said if you adopt your paternal uncle or brother, because the feelings with which you used to look upon them are inconsistent with the feelings entertained by a father towards his son. In such cases there is incongruity of relationship. You may undoubtedly say that the relation between an elder and a younger brother, according to some passages of Hindu law, resembles that between a father and son, and ask why should there be an objection on the above ground to the adoption by an elder of a younger brother? That, no doubt, is in accordance with the ancient usage, but people in modern times do not feel that sort of respect towards their elder brothers;[1] the idea of equality is conformable to modern notions with respect to the relation between brothers. But I may tell you in this connection that the ancient ideas have not entirely ceased to exist; for, in Cashmere a principality governed by Hindu kings, the general usage amongst the people is to adopt their younger brothers.[2]

From the foregoing considerations, it follows that as regards agnatic relations, the principle of incongruity of relationship would exclude all those that do not occupy the position of sons; in other words those only who are one degree lower than the adopter may be taken in adoption. According to this principle, neither a paternal uncle nor a grand-nephew would be a fit person for adoption.

Let us now examine this principle with respect to female relations who also, according to the classificatory system and for the same reasons, are divided into those occupying the position of the mother, or of the sister, or of the daughter. And this division not only applies to consanguineal female relations but also to the wives of agnatic sapinda relations. The latter again may be considered consanguineal relations, for according to all the schools of Hindu law, a married woman becomes from the moment of her marriage, a consanguineal *sapinda* relation of her husband and of his sapinda relations.[3] The joint family system also requires that the wives and daughters of the members of such a family should be regarded according to their rank, with such feelings as one entertains towards his mother, sister or daughter. This is expressed in the following passage of Vrihaspati,—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an

[1] Dáyabhága, III, 27.

[2] I am so informed by Babu Nílámbara Mukhopádhyáya, who was for some years the Chief Judge of that state.

[3] *Lallubhai Bapubhai* v. *Mankuvarbai*, I. L. R., 2 Bom., 388; S. C. before Privy Council, *Lallubhai Bapubhai* v. *Cassibai*, I. L. R., 5 Bom., 110; 7 C. L. R., 445; L. R., 7 I. A., 212; Dáyabhága, IV, 2, 14; XI, 1, 2.

elder brother are pronounced similar to mothers."[1] Now if the boy intended to be adopted is the son of a near female relation with whom the adopter often comes in contact, and whom he is to regard as mother or sister or daughter, the adoption would involve incongruity of relationship, for notwithstanding the legal severance of connection, the mother of the boy will not cease to look upon the boy as her son; and this will be inconsistent with the relationship subsisting between the woman and the adopter. The adoption of a brother's son might be objected to upon this ground, but it should be observed that he and others holding the same rank are looked upon as sons even without adoption. Considering the relations expressly prohibited, this seems to be the reason which induced Nanda Pandita to ferret out some rule to cover those cases.

The incongruity of relationship in adoptions is compared by the author with incongruous relationship in marriages, which supports the above view of the principle. But be it specially noticed that no marriage is invalid on the ground of the relationship being incongruous. In addition to the two cases mentioned in the Grihya-Parisishta of Ásvaláyana there are other passages prohibiting, on the selfsame ground, the marriage by a man of his stepmother's sister, her brother's daughter and his children's daughter as well as the preceptor's daughter; but, however improper such marriages may be, they are nevertheless valid;[2] sapinda and sagotra females only are legally prohibited. Such marriages are generally contracted by high-caste Bráhmanas of Bengal, who are compelled by the restrictions imposed by Kulinism, to choose their wives from a certain limited number of families. This should be borne in mind for the purpose of considering the character of Nanda Pandita's rule whatever it may be.

The conclusion at which we arrive from a consideration of this principle is, that a man may adopt the son of a male relation who is in the same degree of descent from the common ancestor, and no other relation. But it should be observed that the principle does actually apply to the nearest relations, though it may theoretically extend to all; there must be some reasonable limit to its operation. This principle, however, is but the counterpart of the other, and let us see whether anything definite can be gathered from it.

**Capability of being begotten by the adopter himself through Niyoga, and so forth.**—Equally vague is the other criterion for determining eligibility for adoption, namely, "the capability of being begotten by the adopter himself through *niyoga, and so forth.*" The first question that suggests itself on reading this passage is, whether the word *ádi* आदि or "*and so forth*" does indicate any-

[1] Dáyabhága, 4, 3, 31.

[2] See Raghunandana's Udváhatattva, (Serampore Edition) Vol. II, page 66.

thing or is an expression which is often found in argumentative writing or speech. but which conveys no definite meaning at all?

Pundit Bharatchandra Siromani the Sanskrit commentator of the Dattaka-Mímánsá, explains the expression *(ádi) and so forth* to indicate "the receipt of wealth" as remuneration for the service. It should be observed that *Niyoga* means direction or order given by one person to another under his authority. According to ancient usage a woman might be *directed* or *ordered* by her husband or any other protector to raise issue by intercourse with another man. Ordinarily a member of the husband's family, who was also under the authority of the elder of the family, was *directed* or *ordered* to procreate issue on the authorized woman; on failure of him a stranger was invited by the offer of wealth to raise issue. Although the usage itself is called *Niyoga* in consequence of the necessity of *direction* to the woman in all cases, yet as regards the man he may be a party to it either by reason of the *direction* (= *Niyoga*, or "appointment to raise issue") or through the receipt of remuneration.[1]

Nothing can be more obscure, vague and unsatisfactory than Nanda Pandita's treatment of this subject; he requires us to ascertain the relations prohibited for adoption by considering whether the adopter could, according to an ancient practice which he himself maintains had long since ceased to exist, be appointed to raise issue on the mother of the boy intended for adoption. As if everything connected with that institution which is condemned even by Manu and other sages, were clearly set forth in the Codes or the commentaries, so that a reference to them might at once show who could or could not be so appointed. On the contrary, neither the Codes nor the commentaries furnish any information whatever on the point. What we find in them will appear from the following passages:—

Manu:—"On the failure of issue (by the husband,) the desired offspring may be procreated either by her *(Devara) brother-in-law* or any other *sapinda* on a woman duly authorized *(Niyuktá* = ordered or directed)."[2]

Yájnavalkya:—"The son of the wife is one begotten on a wife by a *Sagotra* or *any other*."[3] In another passage[4] he declares:—"The *(Devara) brother-in-law* or a *sapinda* or a *sagotra* being directed by the Guru (such as the father-in-law[5]), and being sprinkled with clarified butter, should approach the sonless woman after each catamenia for the purpose of procreating a son; should approach until conception, otherwise he would be degraded: a son begotten in this mode becomes the husband's wife's son."

These instances are sufficient to show how the subject has been dealt w. h

[1] Dattaka-Mímánsá, V, 16.
[2] Manu, IX, 59.
[3] Yájnavalkya, II, 128.
[4] Yájnavalkya, I, 68-69,
[5] Mitákshará, on the above texts.

by the sages. The commentators also do not throw any additional light.[1] The above passages lay down that any person who is willing may be appointed, at any rate, no restriction of any kind is specified in any work on law.

That being so, one who attempts to explain the text of Nanda Pandita must find out some meaning by guess. Accordingly Pandita Bharatchandra Siromani, his commentator, says that since in the texts of Manu and Yájnavalkya the brother-in-law is separately mentioned as the man to be appointed to raise issue, though he is included under the terms *sapinda* or *sagotra*; therefore it is intended by the sages that a sapinda or a sagotra who occupies the same rank as the brother-in-law, in other words, who is of the same degree with the husband, may only be appointed, and no other. Hence the adopter must stand in the relation of a brother-in-law to the adoptee's mother, when they are related to each other, in order that the adoption may be in accordance with Nanda Pandita's rule. According to this view, in addition to the relations enumerated, all cousins of the same degree with the adopter, and the grand-nephew should be excluded.

The passages of Manu and Yájnavalkya, however, do not appear to justify the above interpretation; and they have not been construed in that way by other commentators who appear to understand them to lay down that any sapinda or sagotra without any distinction may be appointed to raise issue.

But it seems that what Nanda Pandita really intended to lay down can be understood, if we direct our attention to that part of the Hindu Codes, which deals with heinous sins and crimes, and the mode of their expiation and punishment. We find it laid down there, that cohabitation with another person's wife is sinful,[2] that with a female of the same *gotra* with the man himself is a heinous sin, and that with certain specified female relations is an unexpiable sin of the worst type.[3] At the same time a man is permitted by the foregoing passages to procreate a son on a woman who is a sapinda or a sagotra to him. There is thus a conflict of law, and the only satisfactory way of reconciling it is, that cohabitation with the female relations specifically named must be taken to be absolutely prohibited. The following passages of Yájnavalkya,[3] will enable you to appreciate the argument:—

"Sexual intercourse with a friend's wives, maidens, *uterine sisters*, low caste females, *females of the same gotra*, and *daughters-in-law*, is ordained to be equal to violating the bed of one's own father or other ancestor. He who cohabits with his *father's sister*, *mother's sister*, *maternal uncle's wife*, *daughter-in-law*, *step-mother*, *sister*, the daughter of his *vedik* teacher, the wife of his *vedik* teacher, or

[1] See Mitákshará, 1, 10; 1, 11, 1 and 5: Víramitrodaya, pp. 104-111.

[2] Manu, XI, 60; Yájnavalkya, III, 235.

[3] Yájnavalkya, III, 231-233; see also Manu XI, 55 and 59; III, 131-133.

*his own daughter* is (deemed) violator of the bed of his father. He shall be beheaded after emasculation, even when the woman was impelled by inclination."

It should be observed that although "females of the same gotra" are generally prohibited, yet the daughter, the sister, the father's sister, the daughter-in-law and the step-mother, who are *sagotra* either by birth or marriage, are separately specified. It would be altogether unnecessary to specify them when they are included under the general term "females of the same *gotra*," except for the purpose of indicating that the offence is the greatest in the case of the enumerated females.

So Vishnu says[1]:—"Sexual intercourse with the mother, the daughter and the daughter-in-law is *ati-pátaka* or worse than the most heinous sin.[2] Sexual intercourse with the Guru's wife is *mahápátaka* or the most heinous sin.[3] Sexual intercourse with the wife of the paternal uncle, the maternal grandfather, the maternal uncle, the father-in-law and the king; as also with the father's sister, the mother's sister, and one's own sister, is equal to violating the bed of the Guru."

It follows therefore that a man could not be appointed or rather accept an appointment to raise issue on these enumerated female relations of his, when intercourse with them is pronounced to be a most heinous sin and crime, punishable by emasculation and death. This illustrates the meaning of Nanda Pandita's rule, covers all the cases excluded by him, and includes a few more in the same category. Otherwise you cannot explain the common principle, upon which a half brother and a paternal or maternal uncle of the half blood are excluded by Nanda Pandita.

**Relations prohibited for adoption according to the true construction of Nanda Pandita's rule.**—The female relations that are absolutely prohibited to a man for sexual intercourse according to Hindu law as shown above, are:—The wife of the paternal or the maternal grandfather, the father's wife, the father's sister, the mother's sister, the paternal uncle's wife, the maternal uncle's wife, the mother-in-law, the sister and the daughter. It is not necessary to take into consideration one or two others for the present purpose. A man could be appointed to raise issue on all other female relations, by reason of the absence of any specific prohibition.

Therefore the relations prohibited for adoption by a man are: the paternal uncle, the maternal uncle, the brother, the four first cousins on paternal and maternal side, the brother-in-law, the sister's son and the daughter's son.

Taking the above prohibition conversely, a woman cannot adopt the following persons:—her brother, brother's son, brother's son's son, daughter's or ep-

[1] Vishnu, XXXIV, 1. [2] Vishnu, XXXV, 1. [3] Vishnu, XXXVI,

daughter's or son-in-law's son, daughter's or step-daughter's son's son, husband's brother's or sister's son's son, and her own sister's son's son. The husband's son's son and grandson would also be prohibited, but it is not necessary to include them, for their existence is a bar to an adoption by her.

**Sutherland's marriage-theory.**—Mr. Sutherland explains the expression "*and so forth*" in the passage,—"the capability to be begotten by the adopter himself, through an appointment to raise issue on another's wife, *and so forth*," thus,—"By such an appointment, or marriage, *and the like*."[1] The first idea that suggests itself on perusal of this explanation is, what does the learned translator mean by the words "*and the like*"? It must be conceded that those words mean nothing; if that be so, then the words "*and so forth*" in the text may as well be taken, as I have already told you, to be a meaningless expression. It should be observed that the explanation given by Mr. Sutherland does not purport to be supported by any authority.

In his Synopsis, Head Second, Mr. Sutherland expresses his conclusion in these words:—"The first and fundamental principle is, that the person proposed to be adopted, be one, who, by a legal marriage with his mother, might have been the legitimate son of the adopter. By the operation of this rule, a sister's son, and offspring of other female, whom the adopter could not have espoused, and one of a different class, are excluded from adoption. In the present age, marriage with one, unequal in class, is prohibited."

The writer appears to lay down a comprehensive rule of his own including all the cases; for, the exclusion of one of a different class is not put by Nanda Pandita upon the same ground by which the specified relatives are excluded;[2] nor is an adoption of one belonging to a different class invalid,[3] though he is not entitled to all the rights of a son whose adoption is fully approved. The capability of being produced by the adopter himself by an appointment, which is the principle of exclusion is entirely lost sight of, in the Synopsis. Mr. Sutherland appears to have thought that appointment to raise issue, and marriage are co-extensive in operating exclusion. But that view is obviously wrong, as I shall presently show.

This marriage-theory is not supported by any authority except that of Mr. Sutherland himself who seems to have been led into it by the analogy of a similar rule of Roman law,[4] and it cannot be accepted as correct for the following reasons:—

1. It is most unreasonable to suppose that although Nanda Pandita expressly refers to the ancient usage of appointment to raise issue on another man's wife, which had become obsolete and illegal long before his time, for the

[1] Dat. Mím. V, 16, and note. [2] Dat. Mím. II, 74-88. [3] Dat. Mím. III.

[4] *Chinna Nagayya* v. *Pedda Nagayya*, I. L. R. 1 Mad., 65.

purpose of laying down the rule of exclusion, yet his rule is neither more nor less than the one deducible from a consideration of the prohibited degrees for marriage. You cannot imagine that Nanda Pandita's rule could as well be explained by the existing institution of marriage, as by the obsolete and obscure usage of the ancient times, by which he seeks to explain it, without attributing to him wrong-headedness and perversity of intellect.

2. The marriage-theory does not cover all the cases expressly excluded by Nanda Pandita. For he forbids the adoption of a brother, a paternal uncle and a maternal uncle who may be either of the whole or half blood: now, it may very well be, that there could be a legal marriage of a man with his step-mother and his paternal or maternal step-grandmother, if they were unmarried. Hence the rule propounded by Mr. Sutherland is not comprehensive so as to exclude them; it cannot therefore be legitimately taken to be what Nanda Pandita intended to lay down.

3. This shows that marriage, and appointment to raise issue on another man's wife are not co-extensive as regards the prohibited relations. But according to Sutherland's own explanation in his note, Nanda Pundita must be taken to intend "capability to have sprung from the adopter himself by an appointment to raise issue, *or by marriage*," The first question that arises for consideration is, whether *Niyoga* and marriage are to be taken distributively or collectively in order to ascertain the persons to be avoided in adoption, in other words, are those relations only to be eschewed who are excluded by the one as well as by the other of the two tests, or also those that are excluded by either? The next question that suggests itself is, whether the modern or the ancient rules of marriage are to be taken into consideration along with the rules of the ancient usage of *Niyoya* which is forbidden in this Kali age? Marriage-rules for the present age are different in some respects from those prevalent in past ages, for instance widow-marriage though permitted in ancient times, is prohibited in the present age, but has again been legalized by the Legislature. The rules applicable to widow-marriage should rather be taken into consideration, in this connection, than those regarding the marriage of maidens, for the boy's mother being a married woman at the time when he was begotten, it accords better with the reason of the prohibition to consider whether the adopter could marry her if she were a widow at that time, than if she were unmarried; seeing that appointment to raise issue on her must relate to her married state. There is also another question to be solved, namely, what rules are to be followed, if those relating to marriage be contradictory to those respecting appointment; in other words, if the capability of having sprung from the adopter himself is possible under the former, and otherwise under the latter, or *vice versa*? Now, in considering these vexed questions that arise if the marriage-theory be accepted, you should bear in mind the following indisputable rules: first, a man cannot marry a de-

who is *sapinda* or *sagotra* to him; second, a woman by marriage becomes a member of the *gotra* to which her husband belongs, and acquires consanguineal *sapinda* relationship to her husband and his *sapindas;* third, after marriage she ceases to be a member of her father's *gotra*, though she retains the *sapinda* relationship; and, fourth, a *sapinda* or a *sagotra* male relation of a married woman may be appointed to raise issue on her. With respect to the last, it should be observed that the texts say, "a brother-in-law *(devara)* a sapinda or a sagotra male may be appointed"; in the English versions of those texts, the expression "the husband's brother" is used for the word *Devara;* the translation is perfectly correct, but the construction of the whole sentence becomes different, for the words *sapinda* and *sagotra* are construed with the word "husband's," whereas in the original they are to be taken relatively to the woman: the *sapindas* and the *sagotras* of the husband do, no doubt, bear the same relation to her, but in addition to them she has her parental *sapindas*, who may also be included under the term *sapinda* as used in those texts. Let us proceed to see the difficulties that arise from the introduction of the marriage-theory. A man who is related as sapinda or sagotra to a woman may be appointed to raise issue on that woman, but he may not marry her if she were unmarried; her son may be adopted according to Nanda Pandita, but not according to Sutherland. It should further be noticed in this connection that a parental male *sapinda* of a woman cannot marry her, but he may be appointed to raise issue on her, because the term *sapinda* is used in the texts relating to the *Niyoga* without any qualification. A person who is not a sapinda to a woman cannot marry her if she belongs to the same gotra with himself, but if after marriage with a man of another *gotra* she becomes a widow, then she may be espoused by that person, for she does no longer belong to his own *gotra:* her son may or may not he adopted according as you consider whether she may be taken in marriage as widow or as maiden. In illustration of this, take the instance of an adopted son's marriage: a person adopted by a man of a different *gotra*, retains his consanguineal sapinda relationship in his natural family, but ceases to be a member of his natural father's *gotra;* he can espouse a girl of his natural father's *gotra*, if she be beyond the degrees of *sapinda* relationship, whom he could not have married had he not passed out of the *gotra* by adoption.

4. Nanda Pandita compares the incongruity of relationship in adoption with incongruous relationship in marriage. But you never compare one thing with another if both things are identical. Mr. Sutherland would make adoption of a child and marriage of his mother identical for that purpose.

5. Nanda Pandita does not at all refer to the prohibited *degrees* for marriage, but only to incongruity of relationship. And it is a proposition which ought to be accepted on its mere statement that the principles upon which prohibited degrees for marriage are based are not at all applicable to adoptions.

Besides, leaving aside the mistranslation by Sutherland agreeably to his own erroneous view, Nanda Pandita concludes the subject by saying according to Sutherland's version,—"in other words, such person is to be adopted, as with the mother of whom, the adopter might have carnal knowledge." Now the question arises as to how is it to be determined whether the adopter might have carnal knowledge with the adoptee's mother? If his inclination be adopted as the test, you cannot have any definite rule. The prohibited degrees for marriage again, do not prohibit cohabitation, but simply declare that a marriage within them does not create the relation of husband and wife. Hence the marriage-theory does not furnish us with any criterion to determine as to, with what females a man may have carnal knowledge. You have, therefore, no other alternative than to see, with whom is sexual intercourse prohibited by Hindu law. And that subject is dealt with in the part dealing with expiation, to which I have already drawn your attention,[1] and which shows that the sagotra females are generally prohibited, and that a few sagotra females and a few *sapinda* females belonging to a different gotra are only specially prohibited; but all sapinda females belonging to a different gotra are not prohibited for intercourse, though they are prohibited for marriage. Hence also the marriage-theory falls to the ground.

6. The half brother or the paternal first cousin or similar relations of a Hindu may marry his mother's sister or maternal uncle's or aunt's daughter, or any other female sapinda on his mother's side, however disapproved some of these marriages may be. Now, a boy who is the issue of such marriage, may as a *sagotra sapinda*, be most eligible for adoption according to Nanda Pandita's own opinion, but not according to Sutherland's view; hence the marriage-theory would make the author inconsistent with himself.

**Marriage-theory not supported by any Sanskrit writer on adoption.**—There are many Sanskrit writers on adoption, but none of them allude to marriage in this connection; some of them refer to Nanda Pandita's Dattaka-Mímánsá on this very subject, but they do not understand him to lay down a rule of that kind. I shall give you the substance of what they say.

Referring to the text of Saunaka, relating to the daughter's and the sister's son, the Dattaka-Chandriká says that it prohibits the adoption of a daughter's or a sister's son by a person other than a Sudra;[2] and explains the expression "the reflection of a son" in Saunaka's text, to mean the resemblance of a son," or "the capability to have been begotten by the adopter through *Niyoga*, and so forth."[3] The author does, in fact, briefly express what is stated in t e Dattaka-Mímánsá."

The Dattaka-Nirnaya of Srinatha Acharya takes Saunaka's text to forl i

[1] Vide *Supra*, p. 321. [2] Dattaka-Chandriká, 1, 17. [3] *Idem*. 2, 8.

the adoption of the sister's son only; but he cites that text as one of Nárada:[1] this view is noticed by Nanda Pandita.[2]

The Dattaka-Darpana says that a brother and a paternal uncle are to be excepted, as they are unfit for being looked upon as sons; so also the maternal uncle, the sister's son and the daughter's son are to be excluded by reason of the objection of incongruity of relationship against their adoption.[3]

The Dattaka-Kaumudi cites the opinion of Ananta Bhatta to the effect that a brother and a paternal or maternal uncle are to be excepted, since they are unfit to be regarded as sons, by reason of incongruity of relationship. The author adds that the sister's and the daughter's son are also to be avoided. He goes on discussing the subject in the course of which he refers to the Dattaka-Mímánsa and gives his summary in these words,—"A brother's son should not be adopted by a full sister; the daughter's son, sister's son, paternal uncle, and mother's sister's son are not to be affiliated; but even a daughter's or sister's son may be adopted by a Sudra; regard being had to similar incongruity of relationship, others also are not to be adopted.[4]

The Dattaka-Dídhiti reads the text of Saunaka in a slightly different way, and observes that a daughter's son and a sister's son should be adopted by Sudras.[5] It does not say anything about their affiliation by the regenerate tribes.

The Dattaka-Manjari says,—"Amongst Brahmanas the daughter's and the sister's son are excepted, since they are unfit for being looked upon as sons; and for the same reason the paternal uncle and the like are excluded."[6]

Nílakantha in his Vyavahára-Mayúkha,[7] interprets Saunaka's text to mean that Sudras must adopt only their daughter's or sister's son; he does not cite the line relating to the adoption of the sister's son by the twice-born classes, although he quotes all the texts of Saunaka, dealing with adoption. The view which he takes of Saunaka's text is noticed by Nanda Pandita but is rejected by him.[8]

**The Conclusion** to which any reader on carefully perusing these works on adoption, as well as what is written on the subject in other Sanskrit commentaries, must come is, that there was no restriction governing the choice of a boy to be adopted, but Nanda Pandita, while writing specially on the subject, directed his mind to the question, and found only two texts on the subject, namely, one of Sákala and the other of Saunaka. The first of which discourages the adoption of only three relations, namely, the daughter's son, the sister's son, and the mother's sister's son. The second passage is, as we have

[1] Dattaka-Siromani, page, 76.
[2] Dat. Mím. 2, 96.
[3] Dattaka-Siromani, page 153.
[4] *Idem.* pp. 157-158.
[5] Dattaka-Siromani, p. 159.
[6] *Idem.* p. 165.
[7] Page 53, Mandlik's edition.
[8] Dat. Mím. 2, 99-102.

already seen, capable of different constructions, but it is liable to be construed as disapproving the adoption of the daughter's and the sister's son, amongst the twice-born classes. Incongruity of relationship is considered by all the writers who have dealt with the matter, to be the principle upon which those passages are founded, in other words, it is incongruous or inconsistent with refined taste or feelings that certain nearest relations should be looked upon as sons; for instance, that a person who used to call you 'maternal uncle' should address you 'father,' is likely to be repugnant to your feelings. And the same principle is applicable also to certain relations other than those specified in the above passages, such as a brother and a paternal or maternal uncle. But there is no express authority for excluding them. Nanda Pândita supplies that deficiency by deducing the principle of incongruous relationship from Saunaka's expression "reflection of son" and his text referred to above, and excludes a brother and an uncle by the application of that principle. The other writers also exclude those very relations or some of them, but none add any new relation to the list, though it is observed by some writers that other similar relations should be avoided, whose adoption would be liable to similar objection. The paternal and the maternal uncle's and aunt's son and a brother-in-law would be the only other relations excluded according to the only acceptable construction of Nanda Pandita's principle of "capability of having been begotten by the adopter himself"; that capability being wanting in those cases only where the boy's mother is such a relation, that the adopter's cohabitation with her is absolutely prohibited, as is evidenced by the nature of punishment and expiation.

The whole thing appears to be put upon an æsthetic ground; there may also be an ethical element in it. One thing, however, is clear, namely, that Sutherland's theory is supported by none.

**The incest theory, and the adulterous theory of adoption.**—The view which Sutherland sets forth in his Synopsis with respect to the restriction on the choice of the boy to be adopted, has, however, been adopted by the European text-writers and incorporated in their works.[1] But it should be noticed that even Sutherland's rule goes no further than this, that whether an adoption involves incongruity of relationship is to be determined by the consideration whether the adopter could have married the adoptee's mother, had she been unmarried. Great misconception, however, appears to prevail about the nature of the rule, and it has given rise to a false theory of adoption. It is supposed that the adoptive father is deemed to have begotten the adopted son on that son's natural mother, hence if she be prohibited to the adopter for marriage, the adoption would incestuous. Sir F. Macnaghten observes[2]:—"But it was a family of Brahm

[1] 1 Strange, 83; Sir, F. Macn. Cons. H. L., 171; 1 W. Macnaghten, 67.

[2] Considerations on H. L., 171.

and her claim was impugned upon the ground of relationship, it being argued that she could not without *incest* be the mother of her uncle's son." Mr. Mayne remarks,—"The real fiction is, that the adopting father had begotten the child upon its natural mother; therefore it is necessary that she should be a person who might lawfully have been his wife."[1] This notion of incest makes one look upon an adoption in violation of the prohibition, with some degree of abhorrence, and seems to have mainly contributed to the result that these prohibitory rules based upon relationship are regarded to be of a character different from that of the affirmative rules of preference, which are based upon the same ground of relationship, but which have been held, as we have already seen, to be of moral obligation only. It is worthy of remark that if adoptions in the prohibited cases imply incest, then every adoption must involve adultery.

There is no authority, however, in Hindu law for supporting the notion of fictional or constructive incest and adultery. Incongruity of relationship is the principle of Nanda Pandita's rule of exclusion, and *capability* of being produced by the adopter through appointment is the test for determining whether an affiliation involves incongruous relationship. He does nowhere say that the boy is to be deemed actually procreated by the adopter, and he refers merely to the capability of production through the ancient usage of appointment which was not in existence at his time; there is therefore no foundation for even an inference of the supposed fiction.

Besides, if the theory of adoption had been that the adopted son was begotten by the adopter on the boy's natural mother, then the adopted son should have been a consanguineal *sapinda* to the adopting father. But while dealing with the sapinda-relationship of an adopted son to his adoptive father Nanda Pandita and other writers distinctly say that an adopted son cannot become a consanguineal sapinda of the adopter, although a wife becomes so of her husband.[2]

Again if that were the true theory, then an adopted son ought to retain his legal relationship with his natural mother and her relations, and could not be filially connected with his adoptive mother. But on the contrary we find Nanda Pandita laying down that the adopting mother's ancestors become the maternal grandsires of the adopted son[3]; and our Courts hold that an adopted son is entitled to inherit from the adoptive mother and her father and other relations in the same way as a real legitimate son born of her.[4]

I have already told you that procreation forms no part of the idea of sonship according to the Hindu law of affiliation; and there is no fiction of the kind mentioned above. If you like to have a fiction, then, considering the effects of an adoption, you may rather say that the adoptive father has begotten the adopted son on his own wife who joins in the act of adoption.

[1] Mayne's H. L., § 125. [2] Dat.-Mím. VI, 14-17. [3] Dat.-Mim. VI, 50.
[4] *Alikomul Moozoomdar* v. *Uma Sankar Moitro*, I. L. R., 10 Calc., 232; L. R., 10 I. A., 138.

**Incongruous relationship relatively to the adoptive mother should also be avoided.**—If incongruity of relationship be a bar to adoption, it must be considered in relation to both the adoptive father and mother. If a man cannot adopt his sister's son by reason of incongruity of relationship, because he cannot think himself the father of his sister's son, then how can a woman think herself the mother of her brother's son; if a man cannot regard himself as the father of his daughter's son, a woman also cannot regard herself as the mother of her father's son. Repugnance to feelings, which forms the foundation of the rule, applies with greater force to women who are more subjective than men. Accordingly Nanda Pandita lays down that a woman must not adopt her brother's son. It is, no doubt, true that Nanda Pandita has not, in the passages in which he has discussed the subject, expressly mentioned the adopting mother, but the principle enunciated by him, is applicable as well to the adoptive mother as to the adoptive father. Hence it appears quite reasonable that the rules laid down by him should be understood in relation to both the adoptive father and mother, but in converse ways.

With respect to this Mr. Sutherland remarks,—"Nanda Pandita declares, that a woman may not affiliate a brother's son: *if his opinion be correct*, it might be consistently argued, that where a woman is proceeding to adopt with the sanction of her husband or kindred, she must not select generally, one with whose father she could not have legally married."[1] The learned translator seems to forget that the idea of "prohibited connection" for adoption originated with Nanda Pandita who has been more or less followed by some of the later writers, there being no authority in passages of law for prohibiting the adoption of any other than the daughter's, the sister's, and the mother's sister's son. Hence if any doubt arises as to the accuracy of Nanda Pandita's own opinion, it must relate to the matter in its entirety and not so far only as concerns the adoptive mother. The only ground upon which the correctness of Nanda Pandita's opinion can be called into question is, that it is not fairly deducible from the texts. If the learned translator relies upon that ground, then undoubtedly he is perfectly justified in questioning the accuracy of Nanda Pandita's opinion that a woman may not affiliate her brother's son; for, the passage of Manu[2] from which he derives that position is not capable of being fairly construed in that way. But that ground may be equally urged against what Mr. Sutherland calls "the fundamental principle" of selection, whatever it may really be. First of all, Nanda Pandita's construction of Saunaka's text to the effect that amongst the three superior tribes, sister's son is not *mentioned in any Shaster* as a son—is open to the same objection; this interpretation would have been fair, had the Shasters specified who shall or shall not be adopted. In the next place,

[1] Sutherland's Synopsis, Head 2nd.

[2] *Vide supra* p. 309.

accepting his construction of that passage to be perfectly fair, what you arrive at is, that Sáunaka and Sákala[8] forbid the adoption of the daughter's, the sister's, and the mother's sister's son. Now, you must bear in mind that both these sages do at first lay down that preference is to be given by the adopter to his relations in the order of *sapindas*, *sagotras* and others, which terms include all descriptions of connection; then they lay down the prohibition by way of exception to the previous rule; the prohibition therefore must be limited to the two or three named relations, for the substance of the rules according to the fair construction of the passages is, that you may adopt any relations excepting the two or three. There is therefore no room for drawing a general principle of exclusion from the prohibition. Nor can the expression "reflection of a son," suggest to any reader of the passage the meaning which Nanda Pandita has put upon it. It is impossible therefore to differentiate between the two rules upon that ground.

Mr. Sutherland's opinion, however, seems to be based not upon the above ground but upon his view expressed in the first Head of his Synopsis, namely, that a woman is capable of adopting not in her own right, but in right of her husband, and therefore the incongruity of relationship is to be considered solely with respect to him. It may be true that a woman has no right to have a son independently of her husband, that her husband may have a natural born or adopted son apart from her, and that son may be a son to her in a secondary or tertiary sense, although such son may be old enough to be her father; but nevertheless there is no reason why the same principle of incongruous relationship should not be applicable also relatively to her, when she joins with her husband in adopting a son, or she alone adopts one under her husband's permission, in the character of adoptive mother. It may, no doubt, be said that her husband could have married her mother instead of her, and therefore can adopt her brother. But could he be the father of her brother, and at the same time husband of herself? Possibility of marriage, however, is not the correct test which consists in the repugnance of feelings, common to both the adopting father and mother. As to women's incompetency to adopt in their own right, I have already shown that view to be incorrect.

According to Nanda Pandita the incongruity of relationship must be avoided in relation to both the husband and wife when they jointly adopt, or the wife alone adopts during the husband's life with his assent; in relation to the husband alone when he alone adopts; and in relation to the wife alone when she adopts after the death of the husband. The principle must operate with respect to the persons that are alive, for no relationship can be incongruous to the soul of a deceased person. What objection is possible when the widow adopts her hus-

[8] *Vide supra* pp. 308—309.

band's sister's son, or a man adopts his deceased sister's son? Certainly there cannot be an incest between a living person and the soul of another who is dead. It should be observed that the expression "bearing the reflection of a son" describes the boy who is being adopted, therefore it must be taken in correlation to the person who actually receives him in adoption, and the rule extracted therefrom must be understood in relation to the person performing the ceremony of adoption, which is the subject dealt with in Saunaka's passages wherein that expression is used.

Sir F. Macnaghten, however, was decidedly of opinion that a widow could not take in adoption the son of her uncle. The facts of the case in which the question arose, were as follows: A man died leaving three widows and an authority permitting his widows to adopt, and making certain directions as to which of them should select the boy in case of their disagreement, according to which preference might be claimed by the second widow; but the boy selected by her was the son of her uncle, and that fact was considered to be an insuperable bar to her taking him in adoption; she did in consequence withdraw her claim, the same boy being adopted by her co-widow, and no decision was given.[1] But it should be borne in mind that although the boy so adopted became the son of her husband and the adopting co-widow, he could not become her son for any purpose. Mr. Mayne criticises the above opinion, but he seems to labour under the misapprehension that a son adopted by the husband in conjunction with one wife, becomes the son of all the wives. There is no authority in Hindu law for that proposition. There is only one text of Manu[2] which declares that the husband's *begotten* son by one wife becomes the son of all his wives, in the same way as a brother's son, of all the brothers. The Dattaka-Mímánsá and the Dattaka-Chandriká maintain that in the case of the brother's son, adoption is absolutely necessary in order to constitute him the legal son of his uncles. To this an objection is raised, that if that were so, an adoption would also be necessary in the case of the son of a co-wife to constitute him her co-wife's son,—which is obviated by the argument that as the husband's begotten son is sprung from the husband's body he becomes filially related to his wives[3] in the same way as an appointed or an adulterous wife's son became by operation of law the husband's son.[4] The learned author further remarks—"In fact it would appear that the Hindu law takes no notice of the wife in reference to adoption." But he seems to forget that an adoption is a religious ceremony, and that it is an established principle of Hindu religion that the wife is an indipensable associate for the performance of religious rites. It was therefore, quite n-

[1] Sir F. Macnaghten's Cons. on H. L. 168 (171.)

[2] Manu, IX, 183.

[3] Dat. Mim. II, 69-70; Dat. Chand. I, 23-26.

[4] Dat. Mím. 1, 34.

necessary for the Sanskrit writers on adoption to expressly say anything about her; and they do take notice of the wife where necessary. And if you adopt the Dattaka-Mímansá to be authoritative, you cannot pass over the present point; otherwise the rule in its entirety should be rejected.

**Incongruity of relationship in a Sudra adoption.**—The texts of Sákala and Saunaka[1] dealing with the subject of the selection of the boy, relate to the twice-born classes and principally to the Bráhmanas. Saunaka expressly says that the daughter's and the sister's son are affiliated by the Sudras: therefore those two cannot be taken to be prohibited to that class. Now, the question arises, whether the general rule relating to the prohibited degrees for adoption applies to the Sudras, subject to the above exception. On the one hand it may be argued that the principle of incongruity of relationship is deduced chiefly from the prohibition of adoption by the twice-born classes, of their daughter's and sister's sons, and that when that is permitted to the Sudras, the foundation upon which the general rule is based fails, and with it the whole superstructure goes down. On the other hand it may be argued that the general rule is deduced not so much from that text as from the expression "reflection of a son," that the daughter's and the sister's son only are permitted to the Sudras, and that therefore the general rule must apply to them subject to the above express exception permitting the adoption of the daughter's and the sister's son.

**The character of these prohibitory rules.**—The principal question for consideration with respect to what may be called the prohibited degrees for adoption is, whether these rules are merely recommendatory, or imperative so as to invalidate an adoption made in violation of them. There are several cogent reasons for holding them to be merely directory:—

1. Relationship subsisting between the adopter and the boy intended for adoption appears to have been no bar to affiliation according to the Codes of Hindu law. For, in the first place there is absolutely no restriction laid down; in the second place, the affiliation of the daughter's son as a *putriká-putra* proves affirmatively beyond the shadow of a doubt that there was no such restriction, and the same view is corroborated by the fact that the son produced by a maiden daughter became the son of his maternal grandfather.

2. The majority of the commentators on general law recognize, as we have already seen, the twelve descriptions of sons; some of the latest commentators, do no doubt give prominence to the theory that certain practices though perfectly legal according to the Codes are to be avoided in this Kali age, and say that the Dattaka is the only son that may now be affiliated, but there are a few of the same school who maintain, that the *putrika-putra* may be made even

[1] *Vide Supra* pp. 308—309.

now. But none of them contain any rule hampering the adopter's choice of the boy to be selected for affiliation, on any ground.

3. Admitting that the texts of Saunaka and Sákala are genuine and authoritative, they together cannot be taken to go further than to forbid the adoption of the daughter's, the sister's, and the mother's sister's son. But the manner in which the rule has been laid down should be taken into consideration for judging its character. The substance of what the two authors say is,—"You should adopt your nearest *sapinda* or in his default your nearest *sagotra*, on his failure, a relation of a different *gotra* except the daughter's, the sister's and the mother's sister's son." The exception must be of the same character as the rule to which it forms an exception; and if you pronounce the rule to be of moral obligation, then you cannot but admit that the exception also must be of the same character. There is again a text of Yama which appears to recognize the adoption of the daughter's son by the twice-born classes, for, it says,—"It is not expressly required that burnt-sacrifice and other ceremonies should be performed on adopting *the son of a daughter*, or of a brother, for it is accomplished in those cases, by word of mouth alone."[1] As *Homa* is necessary for the twice-born classes, the adoption of the daughter's son mentioned in this text must refer to them.

4. Saunaka expressly says that the adoption of the daughter's and the sister's son is made by Sudras. From this and the next sentence which is not found in many copies, it is inferred that they are prohibited to the twice-born classes for adoption. Now, if anything is permitted to the Sudras and prohibited to the other tribes, the irresistible presumption is that so far as the twice-born classes are concerned, it is simply disapproved and not absolutely interdicted. For instance, Mann says[2] that the *Asura* form of marriage is lawful only for Vaisyas and Sudras, it is by necessary implication pronounced to be unlawful for Bráhmanas and Kshatriyas; but does it follow that a marriage by a Bráhmana in that form is invalid? Certainly not; such marriages are usual amongst certain sections of the Bráhmanas in Bengal. What rules of this kind mean is, that such and such practice may be allowed to low people, but it is unworthy of respectable persons; in fact such rules simply appeal to the pride of caste for their observance, and fall within the catagory of the Law of Honour, but are not intended to be imperative. I have already told you that the ancient distinction between the Sudras and the twiceborn classes has,

[1] *Huebut Rao Mankur* v. *Govind Rao*, 2 Borrodaile's Reports, 75 (85): I do not remember having seen the original text cited in any commentary of note, but Pundit Bharat Chandra Siromani used to repeat it when explaining to his pupils the prohibition against the adoption of the daughter's son, it is as follows:—

द्वौ पिण्डौ भ्रातृपुत्रे च दौहित्रादि-त्रयस्त्रो न हि। वाग्दानादेव तत्पिण्डैरित्याह भगवान् यत

[2] Manu, III, 24.

to a great extent, ceased to exist, and that the Bráhmanas themselves have become divisible into Bráhmanas by qualification and Bráhmanas by birth, the latter being no better than Sudras some sections of whom again may on account of their culture and purity of conduct aspire to the position of the better classes of the Bráhmanas. A Bráhmana again may, as I have already told you, reduce himself to the position of Sudras by his conduct. If a Bráhmana chooses to adopt his daughter's or sister's son, the utmost that you can say is, that he may fall in the estimation of his caste people by doing an act like a Sudra. But there is no earthly reason justifying the conclusion that the adoption is invalid. Has any Bráhmana been ever outcasted by adopting his daughter's or sister's son, though instances of such adoption are not rare?

5. Nanda Pandita has explained the texts of Saunaka and Sákala dealing with the choice of the boy to be adopted, in the same way as those sages. He has treated of the affirmative as well as of the negative rules in the same manner: he has with elaborate minuteness laid down rules for guiding the adopter to select the boy from amongst his relatives in a certain order, and has likewise extracted a rule of exclusion of a class of relatives, from the isolated instances mentioned by the sages. And neither from the manner nor from the language in which he has discussed the subject—can any distinction be drawn between the affirmative and the negative rules. You cannot put forward any ground for differentiating between them, and if you say that the former are directory, you cannot reasonably affirm that the latter are of a different character. Mr. Sutherland, however, says,[1]—"It has been intimated by writers on law, (he means the lawgivers) that proximity of kindred ought to determine the choice of an adopted son. But, though Nanda Pandita extends this principle with elaborate minuteness, it cannot be regarded, as a rigid maxim of law, vitiating the adoption of a remote, when a near kinsman—or of a stranger, when a relative,—may exist," The learned translator, however, does not favour us with his reasons if any, for discriminating between the two sets of rules which are supplementary to each other.

6. As regards the general rule of exclusion, whatever it may be, which Nanda Pandita lays down upon the principle of incongruity of relationship, deduced by him from the prohibition by Sákala and Saunaka, of the adoption of the daughter's, sister's, and the mother's sister's son,—it rests entirely on the authority of Nanda Pandita. It is a novel rule not found in any other commentary, not even in the Vaijayantí, his earlier book. It cannot be enforced unless Nanda Pandita be admitted to have enjoyed the position of the legislator whose authority is to be obeyed by all the Hindus of India. We have already seen what his actual position was. The want of an enquiry into the age of his work, and Mr. Sutherland's erroneous, though natural, exaggeration of the value of the

[1] Synopsis, Head Second.

works translated by him, clothed the treatise with a halo of antiquity and misled the judges into the belief that it contained authoritative rules observed by the Hindus. As the truth has now become known, one should hesitate to enforce his rules as binding upon the Hindus who, quite innocent of what was written by obscure authors like Nanda Pandita, have been guided by their ancient customary law and usages in matters like adoption. If Sutherland's rule be enforced, numerous adoptions in Bengal would be invalidated.

7. Nanda Pandita himself does not seem to put the rules higher than as preceptive; and this is clearly indicated by his comparison of the incongruity of relationship in adoptions, with the incongruous relationship in marriages; it is to be avoided in the one case just as in the other. But it is universally admitted by commentators on the Hindu law of marriage, that a marriage involving incongruity of relationship is perfectly valid in law, though reprehensible. While dealing with the prohibited degrees for marriage in his Vaijayantí or commentary on the Institutes of Vishnu, Nanda Pandita does not at all refer to the passages of law, bearing upon incongruity of relationship as a ground of exclusion.

8. The giver is capable of making the gift, and the adopter is capable of accepting the gift, but the thing given is tainted with a defect. What is the legal consequence according to Hindu law, when the adoption has been completed by the due performance of all the ceremonies, in violation of the rule forbidding the acceptance of the particular thing? This is precisely similar to the case of a Bráhmana accepting a gift from a thief, discussed in the Mitákshará: there is a passage of law prohibiting the acceptance of such gift, but the Mitákshará says that the precept does not affect the legal validity of the gift and acceptance, the property passes to the donee, and the transaction is perfectly valid, but the acceptor incurs sin. In fact these are the cases to which the doctrine of *factum valet* is properly applicable.

9. The religious ceremonies accompanied with the *Homa*, or burnt sacrifice, and performed in the manner prescribed by the Sástras, are, according to the doctrine of the sacred law and the belief of the Hindus, attended with irrevocable consequences, which cannot be undone when the ceremonies have been once done. An adoption performed with the Vedik rites cannot be annulled on any ground. With respect to the adoption of the eldest and only son, the Shástris of Bombay observed,—"Before committing this fault he should have reflected, but if he did it without reflection he cannot take him back again. For it is thus said, 'That which is done, cannot by an hundred negatives undone,' and from this it is clear, that what is done according to the rules the Veda, cannot be annulled."[1] And this rule applies to marriages within pro

[1] *Huebut Rao Mankur* v. *Govind Rao*, 2 Borrodaile's Reports, 75 (89.)

bited degrees through ignorance of law or fact. For instance, Baudháyana declares, "If a man marries a *sagotra* damsel through ignorance he shall maintain her as a mother." Raghunandana[1] cites this text and a few others of similar effect, and provides expiation for such marriages, but he does not say that the marriage is void, or that the woman may be restored to her original position: cohabitation is, no doubt, prohibited, but the woman must remain dependent on the man who is to provide her with maintenance, that is to say, the relation in other respects must be the same as between husband and wife; the apparent reason being that what has been done with Vedik rites cannot be undone. The principle applies to adoptions with greater force, for the restrictions relating to them cannot bear comparison with prohibited degrees for marriage which are based upon social reasons of a grave character. With respect to an adoption of a boy from a different caste, Nanda Pandita, after having prohibited it in the same way as adoptions under consideration, says that if a boy of a different caste be adopted, he should not be made the heir to the estate, but food and raiment must be allowed to him.[2] In fact, the adoption is valid, but the adoptee acquires an inferior status. The Hindu law again does not recognize an *Action* for having a marriage or an adoption declared invalid. As regards marriage, great divergence of opinion prevails amongst the sages with respect to the prohibited degrees, and various usages obtain in different localities and amongst different castes. That may be the reason for not allowing such *Action*, the matter being left to the discretion of the people and the control of the castes, who act according to the usages obtaining amongst them. An *Action* for revoking a gift in adoption might perhaps lie under the topic of litigation called revocation of gift; but, that could be done only at the instance of the natural parents; for, no other relation could lay any claim to the parental property in the child. But, however grossly incestuous an adoption might be fancied, never has any objection been raised against it by the caste people of the adopter or the natural father, nor does any social opprobrium ever attach to it. On the contrary, he is recognized and treated by all people as the son of the adopter. The only person who takes exception to it, is he who would be the adopter's heir, were there no adoption. He also does not raise his voice at the time of adoption, nor refuse to treat the adoptee as a relation by adoption, until the chance of his getting the adopter's property arises when, for the first time, the adoption appears to him to be irreligious and contrary to the Sástras.

**Case-law relating to the prohibited degrees for adoption amongst twice-born classes.**—Let us now proceed to see how the law really stands at present, and it is to be found not so much in this or that commentary as in the

[1] Udváhatattva; see Serampore Edition of Raghunandana's Works Vol. II, 62.

[2] Dat. Mím. III, 1-3.

decisions of the Courts. We have already seen that of the two branches of restrictions based upon relationship to the adopter, namely, one enjoining him to give preference to some relations, and the second to eschew others,—the first has been held to be merely directory and not legally binding. But as regards the latter, the same view is not taken in all provinces. In some localities the prohibitory rules are regarded to be of the same character as the affirmative ones; whilst in others an opposite view is taken, and they are considered to be imperative. This distinction appears to be mainly due to the marriage-theory of Mr. Sutherland, and the consequent false theory of adoption and the implied idea of incest, which seem to have misdirected the courts to think that the prohibitory rules are of a different character. As regards the relations prohibited, a distinction should be drawn between those expressly mentioned by Nanda Pandita, and others that may be included under the general *rule* of exclusion which is propounded by Nanda Pandita and borrowed by the author of the Dattaka-Chandriká, but not noticed by any other *commentators*, and which itself is obscure and vague. Of the six enumerated, the exclusion of three, namely, the daughter's, the sister's, and the mother's sister's son is based upon the express authority of Sákala and Saunaka; but there is no clear authority in support of the exclusion of the remaining three, namely, the brother, the paternal, and the maternal uncle. As regards the latter two, their adoption has never been heard of, nor is likely to take place; and the adoption of a brother is also unheard of, except in some localities where a younger brother is adopted. But the question of the validity of a brother's adoption can seldom, if ever, come before the Courts, the property of the adopter would in most cases pass to him even without adoption. If adoption be looked upon as an appointment of an heir, then the daughter's and the sister's son appear to be the *fittest* persons whom nature points out for adoption by a man having no nearer relations. The prohibition against their adoption operates with considerable *hardship*; suppose, a member of a Mitákshará joint family wishes to give his undivided interest to his daughter's son, he cannot do it except by coming to a partition with his coparceners, which may be impossible if he lies on his sick-bed and dies without separation. In the Bengal School it is not necessary to have recourse to adoption for that purpose, nor would it be profitable to other relations to contest the validity of such adoptions, for ordinarily the daughter's son or the sister's son as such will be the heirs of the adopter.

**Case-law in Bengal.**—SISTER'S SON.—In the first case in which the question of the validity of the sister's son's adoption arose, it was held in 10 that an adoption by a Bráhmana of his sister's son was valid.[1] But in 18 ,[2]

[1] *Ramchunder Chatterjea* v. *Sumboochunder Chatterjea*, Sir F. Macnaghten's Cons. on L., 167; 1 Morley's Digest, 18.

contrary view was expressed, namely, that a Hindu (Bráhmana) cannot adopt his sister's son, as it imports incest.[1] With respect to the first case, Sir F. Macnaghten says,—"This decision is *manifestly* wrong and opposite to all authority, except the deposition of some Pundits, who by their testimony on oath, led the Court into error." The author is further of opinion that the doctrine which prevailed in that case has been overruled by a subsequent proceeding in the Supreme Court which, however, gave no decision on the point.[2] The learned author's attack upon the Pundits, however, seems to be due to a misconception, for, in the first case, the question was, whether the adoption of the sister's son which had been completed was valid; and, in the other case, the question was, whether a boy who was related as the paternal uncle's son to one of three widows permitted by their husband to adopt, could be properly taken by that widow or by any other, and the question arose before adoption. There was thus a great distinction between the two cases justifying a difference of opinion amongst the Pundits. The applicability or otherwise of the doctrine of *factum valet* may also explain the divergent views of the Pundits. However that may be, the question has not arisen in any other case.

DAUGHTER'S SON.—There is one case in which the adoption of a daughter's son was upheld.[3] The Pundit in his opinion does not at all refer to the texts prohibiting his adoption. Mr. W. Macnaghten, however, says[4]—"We must suppose, though it is not distinctly stated, that the parties in the case which gave rise to the question in this case were *Sudras*; otherwise the reply does not seem consonant to law."

SISTER'S SON IN MITHILA.—It has been held that the adoption of a sister's son in the Kritrima form amongst the superior tribes is valid.[5] According to the opinion of the Pundits, "the Kritrima form of adoption prevails as approved by the people of that country, without regard to the legal distinctions of the *Dattaka* form excluding an only son &c., and one precluded by reason of his mother's affinity." It should be observed, however, that the prohibited degrees for affiliation are deduced by Nanda Pandita from a text describing the formalities of adoption, and he is of opinion that the same formalities should be observed also in the Kritrima form of adoption,[6] so far as they are applicable. Besides, the principle of the exclusion applies as well to the Kritrima as to the Dattaka adoption; and the Dattaka and the Kritrima son do, according to the Smritis, hold precisely the same position, and the present distinction between them is due to the modern development of law. If Nanda Pandita's rule be im-

[1] *Doe dem. Kora Shunkho Takoor* v. *Bebee Munnee*, East's Notes, Case 20; 1 Morley's Digest, 18.

[2] Considerations on H. L., 166, 168

[3] 2 W. Macnaghten, 185.

[4] *Idem.* note, p. 187.

[5] *Purmessur Dutt Jha* v. *Hunooman Dutt Roy*, 6 Beng. Sel. Reps., 235 (192.)

[6] Dat. Mim. V, 47-56.

perative, it ought to be enforced also in Kritrima adoptions. In a [later case,][1] however, the validity of an adoption of the sister's son in the Kritrima form was rested upon the ground that the parties to the litigation did not belong to any of the three regenerate castes.

SISTER'S SON AMONGST BEHAR KÁYSTHAS.—An adoption of the sister's son was held valid in a case,[2] the parties to which were Káyasthas of Behar, upon the ground that they were Súdras and not twice-born as was contended by one of them.

BROTHER.—Relying upon the authority of the Dattaka-Mímánsá, the Pundit gave his opinion that an elder brother could not be adopted in the Kritrima form by the younger brother and it was accordingly held that such adoption was invalid.[3]

PATERNAL UNCLE'S SON.—In an unreported case[4] the Calcutta High Court (Justices Pigot and Beverley) upheld an adoption of the paternal first cousin upon the marriage-theory of exclusion, which was not applicable to the case. It should be remarked that he is not expressly excluded by Nanda Pandita. But it ought to be noticed that this decision is opposed to the *Niyoga* theory of exclusion, for a man could not be appointed to raise issue on his paternal uncle's wife.

FRATERNAL NEPHEW'S SON.—The adoption of a grandnephew was held to be valid;[5] its validity was impugned before the High Court upon the ground that the adopter could not marry his nephew's wife, but it was clearly untenable. It appears, however, from the judgment that the Pundits of the Court had given a Vyavasthá against the validity of the adoption, the reason for which is not set forth, but it must have been the *Niyoga* theory as explained by Pandit Bharatachandra Siromani.[6]

PATERNAL COUSIN'S GRANDSON.—Following the above decision an adoption of the paternal uncle's great-grandson was declared valid.[7] Its legality was called into question upon the ground that he did not according to the classificatory system, occupy the position of a son but of a grandson, and therefore he could not be adopted, the argument was in fact based upon the view taken by Pandit Bharatachandra Siromani. The following observations of the High Court (Justices L. S. Jackson and L. R. Tottenham) throw a flood of light upon the entire subject, and deserve careful study:—"We think it by

[1] *Nunkoo Singh* v. *Purm Dhun Singh*, 12 W. R., 356.

[2] *Báboo Runjeet Sing* v. *Báboo Obhye Nárán Sing*, 2 Beng. Sel. Reps., 315 (245.)

[3] *Rájcoomar Lálí* v. *Bissessur Dyál*, I. L. R., 10 Calc., 688.

[4] Analogous Regular Appeals Nos. 84, 299 and 351 of 1884.

[5] *Morun Mose Debeah* v. *Bajoy Kishto Gossámee*, Special number of W. R., F. B., 12

[6] *Supra*, p. 321.

[7] *Háránchunder Banerjee* v. *Hurromohun Chuckerbutty*, I. L. R., 6 Calc., 41; 6 C. L. R., 393.

no means clear that the phrase 'the reflexion of a son,' was intended to bear the limited signification which he (the subordinate Judge) has put upon it; and looking to the place in which it is found, we think it very questionable whether it was intended to limit the generation from which a son might be adopted, or as anything more than a descriptive epithet applied to the child adopted. The phrase, as has been said, occurs only in the portion of the book which prescribes the ceremonial, and not in the part which lays down rules as to the selection of a son. Had the Lawgiver intended to limit the choice to the one generation, next below the intending adopter, he would surely have laid it down distinctly and not have left it to be doubtfully, and with much dispute evolved from an epithet applied to the child in the verses describing the ceremonies to be performed, and as to whom those ceremonies have been nearly completed. The passage has no doubt provoked discussion and difference of opinion amongst the Pundits, but so far as either common sense or any judicial authority goes, there is no ground for holding that a grandnephew or a cousin's grandson, when adopted, does not equally with a nephew bear the reflection of a son."

These appear to be the only cases upon the subject in Bengal. No adoption has been declared invalid by the application of the marriage-theory of exclusion, though it has been referred to and relied upon in several of the above cases, for holding that the adoption of particular relations was not invalid.

**In the Punjab, no prohibited degrees for adoption.**—The adoption of the daughter's son,[1] the sister's son,[2] the brother's daughter's son,[3] and the sister's daughter's son[4] are held valid amongst Jats, Rajputs, Kshatriyas, and even Bráhmanas of Delhi. This view of the law is based upon the general custom of the Punjab. There are a few cases showing that the Punjab Chief Court required the parties to prove custom in each case, and on their failure to do so disallowed such adoptions.[5] But the Court was, upon enquiry in subsequent cases, satisfied as to the existence of general custom,[6] or of the state of the law under the Sikh rule;[7] and accordingly it has been ruled that a party

[1] Bráhmanas,—Punjab Records of 1873, case No. 13, page 26; Kshatriya,—Punjáb Records of 1883, case No. 64, page 189; Idem, case No. 162, p. 506; *Idem* of 1886, case No. 57, page 119: Játs and other castes,—*Hari Sing* v. *Gulába*, Punjab Records of 1874, case No. 50, p. 133; of 1879, 50, 134; of 1881, 66, 149; of 1883, 167, 525; of 1884, 154, 369; of 1885, 5, 11; Idem, 35, 65; of 1886, 85, 186.

[2] Bráhmanas,—Punj. Rec. of 1883, 149, 449: Rájput,—P. R. of 1874, case No. 35; Játs and others,—P. R. of 1875, 1, 1; Idem, 50, 138; of 1883, 172, 535; of 1886, 33, 59.

[3] Kshatriyas—P. R. of 1878, 72, 233: Jats,—P. R. of 1884, 27, 72; of 1885, 86, 181; of 1886, 43, 82.

[4] Játs,—Punjáb Records of 1878, 77, 242; of 1885, 120, 284.

[5] Punjáb Records, 1867, case 24, page 75; Idem, 1873, case 31, page 50.

[6] *Hari Sing* v. *Gulába*, Punjáb Records of 1874, case 50, page 133.

[7] Punjab Records of 1867, case 24; of 1875, case 1, page 1.

denying the validity of such adoptions, in other words, alleging that they are governed by what is regarded by the Courts of other Provinces as the general law, must prove the allegation.[1]

It is really looking at the matter from a wrong point of view, to suppose that such adoptions are valid in the Punjab under the peculiar custom of that Province; whereas the more accurate view appears to be, that they are permitted or rather not prohibited by the Hindu law by which the people are actually governed, and which is contained in such works as the Mitákshará. I have given you at considerable length, the reasons why Nanda Pandita's work should not be treated as an authority; and the state of the law in the Punjab furnishes us with conclusive proof that the innovations contained in the comparatively recent treatises of that kind are not respected, and their doctrines not followed by the Hindus. When they are not respected in the Punjab, is there any special ground for considering that they are followed by the Hindus of other parts of India? On the contrary, there are strongest grounds for believing that if an enquiry be even now instituted by the Government, the customs and usages in this respect, of the Hindus in other parts of India would be found to be the same as in the Punjab.

**In Allahabad Nanda Pandita's rules followed.**—There are very few cases on the subject, decided by the Courts in the North-West Provinces. The High Court of Allahabad, however, have given effect to Nanda Pandita's directions in their entirety.

WIDOW'S BROTHER'S SON.—For, the Court have held that a widow adopting under the permission of her husband, cannot adopt her brother's son.[2]

SISTER'S SON.—It has further been held in two cases[3] that a Bráhmana cannot validly adopt his sister's son. Sir Comer Petheram, C. J., in delivering the judgment of the Court in the later case observed,—"It is urged that the earlier authorities on Hindu law do not prohibit such adoption; that the view taken by the two *Mimansas* is opposed to the earlier authorities; and that the ancient texts upon which the *Mimánsás* prefer to base their view do not support that view. It is admitted that all the Courts have hitherto adopted the view which the Mímánsás take; but it is urged that as that view is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two Mímánsás, and we are bound to follow the authority of a long and uniform course of decisions. Sitting as a division Bench of this Court, it is not competent for us to dis rb

[1] Punjab Records of 1885, case 35, page 65.

[2] *Musst. Báttas Kuar* v. *Luchman Sing*, 7 N. W. P. Reps., 117.

[3] *Luchmeenauth Ráo Naik Kaleyah* v. *Mt. Bhina Báee*, 7 N. W. P. Reps., 441; *Párb* v. *Sundar*, I. L. R., 8 Calc., 1.

the long and uniform course of decisions by all our Courts, from the earliest times, upon this point. If the Respondent wishes to re-open the question, she must go to the Privy Council."

There was an appeal preferred to the Privy Council: the decision of the Judicial Committee, however, was based upon another ground, and the point of law was not decided, but their Lordships expressed a strong opinion concurring with the Chief Justice in his view, thus,—"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son."[1]

JAINAS.—The law and usage of the Jainas, however, sanction the adoption of a sister's son.[2]

**In Bombay**, the earlier view seems to have been different from the present view according to which the adoption of the sister's son and the like is held invalid. While dealing with preference in selection of the boy to be adopted, Mr. Steele gives the order in which relations are to be adopted. He enumerates the *father's sister's* son as one who may be adopted, and concludes by saying that *the sister's son* and *daughter's son* are adoptible in default of all other relations. And in this view, the Poona College agreed with Balchanden Sástri. He goes on to say that neither a paternal nor a maternal uncle can be adopted on account of their being "elder relations"; and from this he infers that a younger brother may be adopted.[3] In the note attached to the above passage, however, he refers to the opinion of a Sástri excluding the daughter's and sister's son. In 1821 the Sástris in their answer to questions put by the Bombay Sudder Court[4] cited the text of Yama recognizing the adoption of a daughter's son. But from the answers given by nine Sástris to certain questions put by the Collector of Poona,[5] it appears that three gave their opinion against the adoption of the daughter's and sister's son, but six others did not allude to any such exception. The opinion of the Sástris is not of much importance because they were not asked to state the effect of an actual adoption of such relations. In 1824 the adoption of the wife's brother was held valid;[6] the Sástris gave it their opinion that the adoption of the brother-in-law is not expressly forbidden by the Sástras, and that when an adoption has taken place with Vedik rites, and the initiatory ceremonies of the adoptee have been performed in the name of the *gotra* of the adopter, the son is invested with the lineage and estate of the adopter. In 1825 the

[1] *Sundar* v. *Párbati*, I. L. R., 12 All. 50 (56.)

[2] *Hassan Ali* v. *Naga Mal*, I. L. R., 1 All., 288.

[3] Steele's L. C., p. 44; see also p. 183.

[4] *Huckbut Ráo Mánkur* v. *Govind Ráo Bulwant*, 2 Borrodaile's Reps., 75 (85 and 87.)

[5] *Idem*, p. 94.

[6] *Bái Gangá* v. *Bái Shivkuvar*, Bombay Select Cases, 73.

Sástri gave it as his opinion that a Bráhmana could not properly adopt sister's son, but when once a person was adopted with the Vedik ce the adoption could not be set aside.[1] In this case the question was, wh could adopt his wife's sister's son; it is difficult to understand how any do could arise upon that point, possibly the Judges were thinking of the Ca Law prohibiting marriage with the wife's sister. In 1867 the Bombay Hig Court upheld the adoption of the sister's son by a Hindu of the Vaisya cast one of the three regenerate tribes.[2]

DAUGHTER'S SON.—It was in 1879 that the Bombay High Court declared[3] the adoption by a Bráhmana of his daughter's son to be invalid, and dealt with the question in an elaborate judgment reviewing all the European authorities and the cases decided by the different Courts. The decision is partly rested on the recent opinion of some Sástris, who are merely Sanskritists without law and who seldom, if ever, adopt sons; partly upon mere inference drawn from Sanskrit treatises on Hindu law, respected in that Presidency; and partly upon some Madras cases subsequently overruled by that Court. The conclusion of the Court is expressed in these words,—"Whether we have regard to the treatises on Hindu law above quoted as of authority in this Presidency, or to the opinions of the Bombay Shastris which have been mentioned, or to the Hindu law as generally prevalent throughout India, we think, that it is a general rule and, as said by Mr. Sutherland, a fundamental principle amongst Bráhmanas, Kshatriyas and Vaisyas that they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son or son of any other woman whom they could not, by reason of propinquity, marry, and that the burden of proving a special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who avers the existence of that custom."

With respect to the applicability of the doctrine of *Factum valet* to such adoptions, the Court makes the following observation:—

"We, however, holding the adoption to be invalid, inasmuch as Brahmans, Kshatriyas and Vaisyas are positively interdicted from, and they are incapable of, making such an adoption, are of opinion that the maxim relied on for the appellant is quite inapplicable. There is no necessity for the Court to set aside that which is void *ab initio*, and the term 'set aside' cannot properly be employed in such a case. That term is applicable only to that which is voidable, not to that which is null and void. In the case of *Lakshmáppá* v. *R*[illegible],[4]

[1] *Ruvee Bhudr Sheo Bhudr* v. *Roopshuker Shankerjee*, 2 Borrodaile's Reports, 656 (

[2] *Ganpatráv Vireshvar* v. *Vithoba Khandáppá*, 4 Bom. H. C. R., A. C. J., 130.

[3] *Gopal Narhar Safray* v. *Hanmant Ganesa*, I. L. R., 3 Bom. 273; *Bhagirthi Bai* v. *Sakharam Bai*, *Idem*, p. 298.

[4] 12 Bom. H. C. R., 364.

ly ado[illegible]e principle on, and the extent to, which the rule *factum valet* is permitted to [illegible]erate in cases of adoption, are fully considered, and this Court concurs in [illegible]hat was said by the Division Court in that case upon that subject. It was [illegible]ere said of that rule, 'that its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the Shastra is merely directory and not mandatory, or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the moral precept on recommended preference be disregarded.' In that case it was held that incapability, in the alleged adopted son, to be given in adoption by a widow without previous assent or direction of her husband—*ex. gr.*, his being an only son at the time of the alleged adoption—would be fatal to the adoption, and could not be aided by the maxim *factum valet*."

It should be observed that in the cases under consideration there is no want of capacity to give or to accept, but the prohibition is considered by the Bombay High Court to be an imperative interdiction. The Court, however, do not consider the principle upon which a precept of Hindu law enjoining or prohibiting something is to be distinguished either as directory or as mandatory. It is not explained, why the affirmative precept on preference should be *assumed* to be recommendatory, and the negative rule forming part of the same precept be *assumed* to be of a contrary character, and an imperative interdiction. The Court have refused to apply the doctrine of *factum valet* to the prohibitions forbidding the adoption of an only son and of the daughter's son and the like, but express an opinion that the affirmative injunctions are merely directory. The reason for this differentiation is not stated. But a prohibition also may be either preceptive or imperative. It would be begging the question to say that this is an imperative rule and the doctrine of *factum valet* does not apply; whereas you are to take into consideration the principles of that doctrine as the criterion for determining whether the rule is intended to be mandatory or recommendatory, in cases like the above; and you should further bear in mind that if the adoption be void and the boy given and accepted be not a son, he would then be the slave of the adopter, according to Hindu law. The validity of such adoptions amongst Sudras should have been taken into consideration for determining the character of the rule; but the Bombay High Court seem to have out-Brahmaned the ancient Bráhmanas themselves in their contempt for Sudras by incorporating with their judgment a note[1] in which marriages of Sudras are fancied to be no [illegible]er than licensed concubinage according to Hindu law as understood by the [illegible]nent writer of the note,—and so the Court were unable to derive any aid [illegible]n the same. Both the Bench and the Bar of the Bombay High Court appear

[1] I. L. R. 3 Bom., 289.

to labour under the erroneous impression that the *lowest classes* of Hindus, who are really of mixed origin, are Sudras who are of pure origin and superior to most of the mixed castes forming the lowest strata of the Hindu community.

Subsequently, however, an application was filed for a review of judgment in this very case upon the ground of custom in the locality. The application was made eighteen months after time, and it was alleged that the delay was caused in consequence of the applicant being engaged in collecting instances of the custom, but the Court were of opinion that that was not sufficient excuse.[1]

WIDOW'S BROTHER'S SON.—An adoption by a widow of her brother's son was upheld, as that fact was not relied on as unfitting him for adoption, the case being one from the Southern Mahratta country.[2]

**In Madras.**—The European authorities found that the usage amongst the people in Madras was different from the law contained in the Dattaka-Mímánsi. Mr. Ellis observes,[3]—"In practice, the adoption of a sister's son by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoption." They seem to have thought that the rule against such adoption is not absolutely binding.[4]

The Privy Council also appears to have considered the rule not to be of such a character as to render void an adoption made in contravention thereof; for, an admission by the father of a party was held by the Judicial Committee to put him out of Court, in the following passage[5],—"If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the appellant's father three times deliberately styles the respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the respondent would of course not be entitled to that designation. They amount therefore to a complete admission of the whole title of the respondent, both in fact and in law, and show that the objections which have been urged to his claim; in the opinion of the appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindu law and customs, had no foundation." It was admitted by Counsel of both parties before the Privy Council that the parties to the case were Vaisyas, but the Madras High Court attempt to get rid of this case by saying that the parties were really Sudras.[6] It is difficult to understand how that fact not known to the Judicial Committee can affect the force of their decision.

[1] *Giriowa* v. *Bhimáji Raghunath*, I. L. R., 9 Bom., 58 (62.)

[2] *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, I. L. R., 6 Bom., 107.

[3] 2 Strange's H. L., 101. [4] 1 Strange H. L., 84; Strange's Manual, secs. 88 & 89.

[5] *Ramalinga Pallai* v. *Sadasiva Pillai*, 9 Moore I. A., 506; 1 W. R., P. C., 25.

[6] *Jivani Bhai* v. *Jivu Bhai*, 2 Mad. H. C. R., 462 (467.)

The Madras High Court, however, taking Austin's view of customary law, namely, that a custom which has never been judicially recognized cannot be permitted to prevail against distinct authority,—did refuse to act upon the opinion of the European authorities, and held that in the Andhra country, a Bráhmana could not adopt his sister's son, and that the theory of adoption is, that the son adopted is to be considered as *actually begotten* by the adoptive father.[1] Of course they laboured under the misconception, that the Dattaka-Mímánsá and the Dattaka-Chandriká contained the general law on the subject, binding on the Hindus in all parts of India. They could not account for the difference of opinion amongst the Pundits, for they observe,—"On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of opinion among the Pandits, but none whatever upon the authorities."[2] The honesty of the really honest Pandits were thus questioned by the learned Judges who laboured under the above misconception. In a later case[3] the adoption of a sister's son was declared invalid, but the party taking exception to the adoption was held to be estopped by his conduct from impeaching its validity. The Court observed,—"On the contrary we are of opinion that although the adoption was invalid and inadequate of itself to create communion, that communion has been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which has resulted."

DAUGHTER'S AND SISTER'S SON.—The lawyers being thus aware of the views of the Madras High Court, as well as of the rule laid down by the Privy Council that in India clear proof of usage will outweigh written texts of law, advised their clients in subsequent cases to give evidence of usage. And it has been held in one case[4] by a Full Bench of that Court that the evidence was sufficient to establish that the adoption of a sister's son by Námbudri Bráhmans is sanctioned by the customary law of Malabar; and it has been more generally laid down by another Full Bench[5] that in Southern India the custom which exists among Bráhmans of adopting a sister's or daughter's son is valid.

MATERNAL AUNT'S DAUGHTER'S SON.—In another case[6] the boy was related to the adopter both on his father's and mother's side, and the validity of the adoption was impeached on the ground of the relationship on

[1] *Narasammál* v. *Balarámácharlu*, 1 Mad. H. C. R., 420.

[2] *Jivani Bhai* v. *Jivu Bhai*, 2 Mad. H. C. R., 462 (468.)

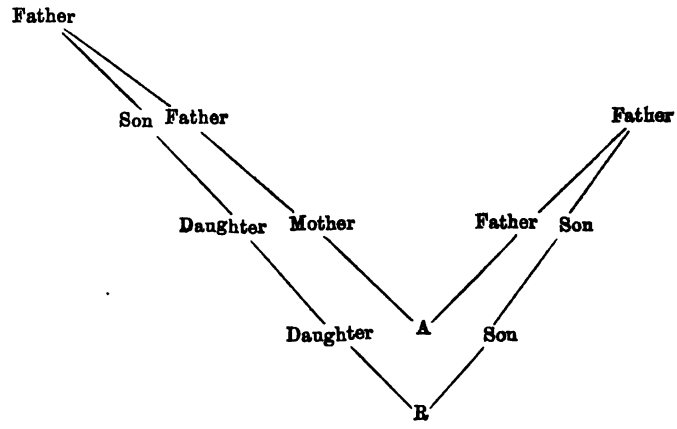
[3] *Gopálayyan* v. *Raghupatiayyan*, 7 Mad. H. C. R., 250 (257.)

[4] *Eranjoli Illath Vishnu Nambúdri* v. *Eranjoli Illath Krishnan Nambúdri*, I. L. R., 7 Mad., 3.

[5] *Vayidinada* v. *Appu*, I. L. R., 9 Mad., 44.

[6] *Venkata* v. *Subhadra*, I. L. R., 7 Mad., 548.

the adopter's mother's side. The following diagram exhibits the previous relationship between the adopter and the adoptee :—




A is the adoptive father and R the adopted son: considering the relationship on A's father's side the adoption is not only unexceptionable, but also commendable, because R is A's paternal first cousin's son and is deemed as a brother's son according to the classificatory system; but it was contended that regard being had to the relationship on A's mother's side, the adoption was bad, as there could be no legal marriage between A and the mother of R, she being within the prohibited degrees. The Madras High Court held in the first place that, according to the usage obtaining both in the Telugu and the Tamil country, a marriage between a maternal uncle and his niece is not incestuous, and they explain the origin of this usage by referring to a hymn of the Rígveda, which appears to recognize the marriage by a man of his maternal uncle's or paternal aunt's daughter. In the second place, it is held that even, according to the general law of the Mitákshará, the mother of R is eligible for marriage by A, and the reason assigned is, that she is beyond the fifth degree. The learned judges appear to have laboured under a misapprehension in calculating degrees of relationship, for the mother of R is clearly within five degrees of A according to the Mitákshará. The Hindu mode of computation of degrees is peculiar; if two persons are within four degrees of descent from a common ancestor who is not beyond four degrees of ascent from either, then they are within five degrees.[1] For instance, the mother of R is in the fourth degree from A according to Hindu law, but she is in the sixth degree according to the Succession Act.[2]

[1] Mitákshará on Yájnavalkya, I, 53; West & Buhler, pp. 121—123, and 490 note.

[2] Act X of 1865, Section 24.

This case illustrates the difficulty and uncertainty introduced by Mr. Sutherland's marriage-theory, according to which the adoption would be invalid.

SON OF THE DAUGHTER OF A SAGOTRA MALE.—A lawyer who is familiar with the mode in which Nanda Pandita has deduced his rule of exclusion whatever that may be, would be disposed to think that when the adoption of the daughter's and the sister's son has been held by the Madras High Court to be valid amongst the regenerate tribes, the *vexata quæstio* of prohibited degrees for adoption has been settled, and much useless litigation sometimes resulting in great hardship has been saved. For, the whole doctrine of incongruity of relationship rests upon texts prohibiting the adoption of the daughter's and the sister's son; and if it is found that that prohibition is not respected in Madras, the foundation itself is wanting, and therefore the whole superstructure must fall to the ground; and it may reasonably be inferred that the rule of exclusion, or the Dattaka-Mímánsá itself, is not respected there. It was, no doubt, upon proof of usage, that the adoption of the daughter's and sister's son is declared valid, but it seems to follow *a fortiori* that relationship does not stand in the way of adoptions. But the Madras High Court look at the matter from an opposite point of view. Nanda Pandita's rule of prohibited degrees for adoption is considered the general law of India, and no exception to that rule is to be admitted except upon clear proof of usage in every individual case, and accordingly it has been held that the adoption of the son of a woman who was by birth a *sagotra* of the adopter is invalid,[1] in the absence of evidence of usage to the contrary. This decision does, for the first time, judicially determine the rule of exclusion, intended to be laid down by Nanda Pandita, and as such, is of very great general importance. The reasons for the conclusion arrived at by the Court are set forth in the following part of the judgment:—

"According to the commentaries, the rule is that niyoga must be possible between the adoptive father and the mother of the child taken in adoption; but according to the inference drawn by Sutherland, it is equivalent to saying that legal marriage must be possible. Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand irrespective of marriage and when the girl selected for marriage is a maiden. But prohibited connection in the case of niyoga has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. In comparing the law of prohibited connection in the one case with that in the other, it is necessary to bear in mind the theory that by marriage a woman passes into her husband's family, or, as the writers on Hindu law say, her gotram becomes that of her husband. It should also be remembered that the rules of prohibited connection had a common object in both cases, *viz.*, the prevention of incest.

[1] *Mínakshi* v. *Rámanádá*, I L. R., 11 Mad., 49.

"In the case of marriage, there are three prohibitions, *viz.*—

(I) The couple between whom marriage is proposed should not be sapindas;

(II) They should not be sagotras; and

(III) There should be no Viruddha Sambandha or contrary relationship, that is, such relationship as would render sexual connection between them incestuous.

"This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife. Now the rules as to the person eligible for appointment to beget a child are to the following effect:—According to Manu, Chap. IX, verse 59, a brother or a sapinda relation can alone be appointed. The brother or sapinda mentioned is the brother or sapinda of the woman's husband who by reason of marriage is in law her own brother or sapinda. As a sapinda his gotram must be the same as that of her husband, and as the marriage between her and her husband must be taken to have been in accordance with the law as to prohibited relationship, she could not have been in her maiden state a sapinda of the person declared eligible for appointment. There is, therefore, no conflict between the law of marriage and the rule prescribed by Manu as to niyoga. Yájnavalkya declares in Chap. II, verse 128, that a Sapinda or Sagotra or some other person may be appointed to beget issue. In Mitákshará, Chap. I, Sec. XI, verse I, the son of the wife is defined to be one begotten on a wife by a kinsman of her husband or some other relative. In Dattaka Mímánsá, Sec. V, verse 16, the commentator says the person appointed may be a brother, a near or distant kinsman and so forth, and, as a justification for introducing the word 'so forth' he observes as follows:—'Nor is such appointment of one unconnected impossible, for the invitation of such may take place under this text,—For the sake of seed, let some Bráhmana be invited by wealth.' As to the sapinda or sagotra of her husband, he could not have been her sapinda or sagotra when she was a maiden, as already explained. As to some other person, the proper construction is, some person like the others previously specified, in the sense that sexual intercourse with him would not be incestuous under the marriage law. Thus, there is no conflict between the law of appointment as to the person eligible for appointment and the law of marriage as to the person eligible for marriage. The object in both was that the sexual intercourse authorized by law should not be incestuous, and the religious foundation for the rule is that the offspring of incest is outcast and not competent to offer funeral or annual oblations with efficacy. The point in the analogy consists in securing a son competent to perform those oblations, and the analogy holds good whether it is considered in connection with the law of appointment or the law of marriage. Marriage, niyoga and adoption were alike ordained from a religious point of

view by ancient writers on Hindu law for the production of a son competent to offer annual and funeral oblations with efficacy, and Sutherland referred to the law of marriage as to what is and is not incestuous connection, probably because it is the law now in force; whilst the commentators referred to the law of appointment and explained it by reference to the law of marriage because the object common to marriage and niyoga was alike to prevent incest. It does not seem to us that in substance there is any error whether the rule of prohibited connection which is taken as a guide is taken from the one or other, provided special cases of deviation from the rule referable to other ancient practices are recognized as exceptions to the general rule when they are proved by usage. As to the argument that the expression 'Viruddha Sambandha' or contrary relationship or prohibited connection is applied by writers on Hindú marriage to relationship other than sapinda or sagotra relationship,—it is perfectly true; but it does not follow that sapinda and sagotra relationship does not render the connection equally incestuous. It would be monstrous to say, and there is no authority for the statement, that a brother might be appointed to beget a child upon his sister for her husband; and marriage is prohibited among Brahamans in Southern India between a girl and a boy who are of the same gotra, because they stand to one another in the relation of brother and sister as being descended from the same paternal ancestor.

"Another objection is that, according to this rule, the adoption of a daughter's son, of a sister's son, and of a brother is not permitted, whilst according to usage it is permitted. In the case of the two former, the special usage is referable to the ancient law of Putrika Putra; and in the case of a brother, if a special usage is proved, it may be referable to the ancient practice of regarding the eldest brother as a father. On this point, however, we do not consider it necessary to express any opinion in the absence of evidence as to usage. But these special cases do not seem to us to negative the applicability of the rule under consideration as a general rule. The case before us is not one referable to any authorized ancient practice or text; nor was there any plea or evidence of a special usage."

THE REASONS FOR THIS DECISION which is, as I have already told you, one of very great general importance, should be carefully examined.

It should be specially noticed that the Full Bench does not accept as correct Mr. Sutherland's interpretation of the words "*and so forth*" in the expression "the capability of having sprung from the adopter himself through an appointment (to raise issue on another's wife,) *and so forth*;"[1] for, he thought that by these words Nanda Pandita intended to include marriage, but the Madras High Court take them to include "invitation by wealth," in fact the Court adopts the same view which Pundit Bharat Chandra Siromani sets forth in his commentary

[1] Dat. Mim. 5, 16 and note.

on the Dattaka-Mímánsá. Hence the prohibited degrees for adoption are to be ascertained by considering the possibility of sexual intercourse of the adopter with the boy's mother *in her married state* through *niyoga*.[1] The Court observes, "the rule is that *niyoga* must be possible, but according to the *inference* drawn by Sutherland, it is equivalent to saying that legal marriage must be possible," and proceeds to examine whether this inference is correct.

The first step in the chain of reasoning seems to be liable to exception; for it is observed,—"Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand irrespective of marriage and when the girl selected for marriage is a maiden." But the Court omitted to take into consideration the fact that all the sages that ordained the rules of the Hindu law of marriage, recognize the *Paunarbhava*, or son of the *twice-married* woman; hence the re-marriage of Hindu widows being recognized, the relationship by affinity must also be taken into account for arriving at a correct conclusion. For instance, gotra-relationship is an artificial one, and as such, is liable to change: a woman by marriage ceases to be a member of her father's gotra, and becomes a member of her husband's *gotra;* similarly an adopted son ceases on adoption to be a member of his natural father's *gotra* and becomes a member of his adoptive father's *gotra;* both of them, however, retain the consanguineal *sapinda* relationship to their *sapinda* relations by birth, but there is this difference that a married woman on her marriage becomes also a consanguineal *sapinda* relation of her husband and his sapindas, whereas the adopted son does not become so, but he becomes a *sapinda* of his adoptive parents in the sense of connection through funeral oblations of food. Now it is admitted on all hands, that an adopted son can espouse a girl of the *gotra* of his birth, if she be beyond the degrees of sapinda relation; therefore by parity of reason, it must follow that a widow may be married by a man of the *gotra* of her birth, if they are not related as sapindas to each other; and that a widow cannot be espoused either by a sapinda or a sagotra of her deceased husband and therefore also of herself. It should be borne in mind that the law of prohibited degrees for marriage is intended to guard against certain social evils which must otherwise spring up. The rule of prohibited degrees for marriage is not the same in all countries; it is framed in consonance to the social exegencies of each community. The Hindu law prohibits the largest number of relations that are not forbidden by any other known system of law. And the reason is not far to seek: the joint family system is the normal condition of Hindu society, and whatever reason may be assigned for the prohibition of the marriage between brothers and sisters, which obtains in all systems of law, applies with equal force to the male and female members born in a joint family. And the same reasons

[1] *Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 16.

that justify the prohibition of the marriage by a man of a damsel who stands to him as a *sapinda* or a *sagotra* by birth, would necessitate the prohibition of the marriage by a man of a widow who is his sapinda or sagotra by affinity, that is to say, whose deceased husband was his sapinda or sagotra by birth.

Passing over some other propositions which are unexceptionable, we come to the following observation,—"It should be remembered that the rules of prohibited connection had a common object in both cases, (*i.e.*, in niyoga and marriage,) *viz.*, the prevention of incest." This remark seems to involve the fallacy of *petitio principii;* for, incest means the sexual intercourse between a man and a woman, marriage between whom is prohibited by reason of consanguinity or affinity; and if you say that *niyoga* must be so arranged as to avoid incest, you *assume* that *niyoga* is not possible between a man and a woman, who cannot intermarry.

According to the Hindu law, marriage is prohibited on three grounds, namely, (1) sapinda relationship, which is consanguineal, (2) sagotra relationship which may be consanguineal or artificial, (3) and Viruddha Sambandha or incongruous relationship including affinity and spiritual connection. The Court in noticing these, says,—"Viruddha Sambandha or contrary (incongruous) relationship, that is, such relationship as would render sexual connection between them incestuous." This observation also seems to be very vague: certain relations by affinity and a few spiritual connections, who are neither *sapindas* nor *sagotras* are prohibited for marriage which if permitted, would involve Viruddha Sambandha or incongruous relationship. But this is simply a moral injunction, for such marriages though disapproved are valid in law. Hence you cannot call them incestuous except in a figurative sense.

Then, the Court, relying upon the vague translation[1] of a text of Manu, goes on to observe,—"According to Manu, chapter IX, verse 59, a brother or a sapinda relation can alone be appointed. The brother or sapinda mentioned is the brother or sapinda of the woman's husband who by reason of marriage is in law her own brother or sapinda. As a sapinda his gotram must be the same as that of her husband, and as the marriage between her and her husband must be taken to have been in accordance with the law as to prohibited relationship, *she could not have been in her maiden state a sapinda of the person declared eligible for appointment.*" In the first place it should be observed that what Manu says is, that the *devara* or brother-in-law, or a sapinda of the *woman* may be appointed to raise issue; there is nothing in the text which may justify the conclusion that the word *sapinda* is to be taken as relating to the husband; but the rendering of the word *devara* or brother-in-law, into "husband's brother" may lead one to think that the word sapinda must also be taken relatively to the husband. Then,

[1] See *Supra*, p. 320.

again the remark that the husband's brother is in law her own brother is erroneous, however consistent it may be with English notions; for, according to the Hindus, the husband's elder brother is to be looked upon as the father-in-law, and his younger brother as a son:[1] the idea of equality is foreign to Hindu notions. The observation of the Madras High Court that a sapinda of the husband could not be the sapinda of the wife in her maiden state, is quite inconsistent with the Hindu law of marriage, though it may perhaps be consistent with the usage in Madras, according to which a man may marry even his maternal uncle's daughter, and therefore prohibited degrees for marriage of a man, on the ground of sapinda relationship, must be limited there within the *gotra* of the family of his birth. But on this side of India, the sapindas on the maternal side are also prohibited, and as Nanda Pandita was an inhabitant of Benares, his views must be understood having regard to the Institutes of law, and not to any usage peculiar to Madras and owing its origin probably to the fact that only a few Bráhman families originally migrated to that place, and the prohibited degrees for marriage, as laid down in the Sástras could not conveniently be avoided by them. I have already told you that a man's half brother or his paternal uncle's son may legally marry his mother's sister or his maternal uncle's or aunt's daughter, though some of these marriages may be disapproved; but there is no objection whatever to a man's paternal uncle's son marrying his mother's brother's or sister's daughter, far less to the marriage between her and a more distant paternal sapinda of his. In such cases, the man is a sapinda both to the paternal uncle's son, or the like, as well as to his wife in her maiden state; and the man being a sapinda of the husband is declared eligible for appointment on his wife who is a *sapinda* to the man in her maiden state. The main ground, therefore, on which the Court bases their conclusion that *niyoga* and marriage are co-extensive as regards the females prohibited, is untenable.

From the foregoing premises the Court appear to be disposed to come to the conclusion in favour of Sutherland's inference, and with a view to fortify that position, it is observed,—"It would be monstrous to say, *and there is no authority for the statement*, that a brother might be appointed to beget a child upon his sister for her husband." This *argumentum ad hominem*, however, cannot be relied on in considering an ancient usage, which is pronounced by Manu himself to be fit only for brutes; besides, it loses its force in the case of more distant female sapinda relations; and the monstrosity disappears in the case of paternal or maternal uncle's or aunt's daughter, not to speak of remoter relations, who are eligible for marriage according to most systems of law. It is on the other hand, equally monstrous to the feelings of the Hindus of the present day to suppose

[1] See Manu IX, 57.

that the father or the paternal uncle or the elder brother of a man could be appointed to raise issue on his wife whom they consider as a daughter-in-law, or that a man could be so appointed on his paternal uncle's or elder brother's wife who is looked upon as similar to the mother. Hence this consideration does not afford any reason for maintaining that the sapinda or sagotra or any other person who was to be appointed must be one related through the husband, and not such relation of the woman herself; the texts do not expressly limit these words in that way: there is thus abundant authority for the statement. Monstrosity is, indeed, the only true guide, and the Hindu lawgivers have, while dealing with sin and expiation, named the female relations by consanguinity and affinity, sexual intercourse with whom is considered so monstrous that the man guilty of the crime is punished with emasculation and death.[1]

It seems to have been contended before the court that when the adoption of the daughter's and sister's son is permitted according to usage, it should be presumed that the rule does not obtain in Madras. As to this, the Court observes,— "In the case of the two former, (the daughter's and sister's son,) the special usage is referable to the ancient law of Putrika-Putra." But it should be observed that if the adoption in the Dattaka form had been a modern innovation replacing the ancient usage of affiliating the Putrika-Putra, then the explanation would have been unexceptionable. But when affiliation in both those forms are of ancient origin; and in one form, or rather in two forms *(kánína* and *putriká-putra)* the daughter's son was affiliated, the inference is irresistible, in the absence of express prohibition by any lawgiver, that he could be adopted in the Dattaka form as well, and that relationship was no bar to adoption. The proved usage in Madras may therefore be very fairly taken to indicate that the ancient state of things continues there, seeing that the general rule itself originated with Nanda Pandita of Benares in the middle of the seventeenth century, and the people of Madras cannot be supposed to have adopted them in the face of the proved usage.

The Court have also relied upon the theory than an adoption made in contravention of the rule is incestuous, which has not, as I have already told you, any foundation to rest upon; but it has not been noticed that Sutherland's inference cannot be logically deduced from a consideration of the relations expressly prohibited by Nanda Pandita, some of whom cannot be excluded by the marriage-theory.

THE ADOPTION OF THE MOTHER'S SISTER'S SON AMONGST SUDRAS has been upheld by the Madras High Court.[2] It should be remembered that the adoption of the daughter's and sister's son is expressly permitted

[1] See *Supra*, pp. 321—322.

[2] *China Nagayya* v. *Pedda Nagayya*, I. L. R., 1 Mad., 62.

to the Sudras. It was argued that, subject to these exceptions, the general law of exclusion must apply to Sudras also. But this argument is obviated by the following observation,—"The two stronger cases are taken out of the rule as to Sudras by the express words of the text containing the restriction. It would be contrary to legal logic to apply the restriction to the case not expressly mentioned." The principle adopted in this case seems to be somewhat opposed to the ruling in the previous case. For, as regards the adoption of the daughter's and sister's son, the law is the same amongst the Bráhmanas of Madras as amongst Sudras; the applicability of the general law to them, therefore, seems to stand on the same footing; but it is held applicable to the one class and not to the other.

BROTHER.—The adoption of a brother is pronounced to be invalid,[1] and an opinion is expressed that a half-brother also cannot be adopted.[2] The usage permitting adoption of a younger brother, however, was alleged in one case.[3]

WIFE'S BROTHER'S SON.—The adoption of the son of a wife's brother has been held[4] valid, the reasons assigned being, that the restriction that a woman should not adopt her brother's son is not found in the Dattaka Chandriká which is accepted as of greater authority in Madras, and that an adoption made by a woman is made for her husband.

**Summary of the case-law on prohibited degrees.**—The result of the decisions of the different superior Courts may be summarised as follows:—

1. The rule of prohibited degrees for adoption is not observed in Mithila, in the Punjab, and partially in Madras.

2. The rule is declared to be the general law of India, and its non-observance in the said provinces is attributed to local customs.

3. The rule is understood to consist in the impossibility of marriage between the adopter and the adoptee's mother in her maiden state by reason of their relationship.

4. The adopted son is deemed to have been actually begotten by the adopter on his natural mother.

5. The above view of the rule has been expressed in every case in which the validity of an adoption was impeached on the ground of pre-existing relationship, although no adoption has been declared invalid by the application of that general rule, excepting one in Madras, in which the adoption of the son of a woman who was by birth a sagotra of the adopter has been declared invalid.

6. Excepting the said instance, the only relations whose adoption has been

[1] *Moottoosamy* v. *Luchmedavummale*, Madras S. D. A. D., 1852, 96.

[2] *Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 15.

[3] *Mínakshi* v. *Rámanádá*, I. L. R., 11 Mad., 49.

[4] *Sriramulu* v. *Ramayya*, I. L. R., 3 Mad., 15.

declared invalid are the brother, the daughter's son, and the sister's son who are expressly prohibited by Nanda Pandita.

7. The prohibition relatively to the adoptive mother is not followed in Madras, though it has been enforced in one case by the Allahabad High Court.

8. The rule of exclusion does not apply to Sudras.

**Caste of the boy adopted.**—I have already dealt with the caste-rules, inter-marriage and inter-adoption between the different classes. If the usage of the absence of inter-marriage with others be taken to be the criterion of a caste, the number of castes cannot be definitely enumerated. The rule laid down by Saunaka is, that the boy to be adopted should belong to the same caste with the adopter.[1] But he adds that if one be adopted from a different caste, he will not inherit the estate of the adopter but be entitled to food and raiment only.[2] The adoption of a son from a different caste is not prohibited by Saunaka, nor by sages who are the real lawgivers; and the commentators on general law, also, admit intermarriage between the different castes, and lay down rules for dividing the estate of a man amongst his sons by wives of different tribes.[3] The fact that a son by a wife of an inferior tribe is entitled to get a smaller share, or to no share at all but to maintenance only, does not take away from him the character of a son. The European writers, however, seem to labour under a misapprehension, for they think that sonship consists only in the right of getting a share of the father's property. But it should be observed that the mere right to maintenance from the adopting father's property may be, and oftener than not is, more than all the rights, present or future or contingent, in the family of birth, put together. There is no authority in Hindu law for the proposition, that if an adoption cannot secure all the rights of a real legitimate son for the adoptee, the adoption is a nullity.[4] Mr. Sutherland, however, would forbid adoption of one from a different caste, upon his theory of marriage which, he says, is prohibited between different castes in the present age.[5]

Yajnavalkya[6] after having defined the twelve descriptions of sons, ordains,[7]—"Among these, the next in order is the giver of the *pinda* or funeral oblations, and the heir of the estate;" and then adds:[8] "This rule propounded by me applies to these sons, when equal in class." The sage means to say that the rule of priority amongst the sons, mentioned by him, applies only when all the sons are of the same caste with the father; but not when they are of different castes. He does not prohibit the adoption of a son from a different caste; nor is it

[1] *Vide Supra*, p. 309; Dat.-Mim., 2, 74-88.
[2] Dat.-Mim. 3, 1-3.
[3] Mitákshará, Dáyabhága.
[4] Mayne's H. L. § 126.
[5] Synopsis, Head Second, para. 1.
[6] II, 128-132; Mitákshará, 1, 11, 1.
[7] Yájnavalkya, II, 132; Mitákshará, 1, 11, 21.
[8] Yájnavalkya, II, 132; Mitákshará, 1, 11, 37; Dat.-Mim., 3, 3.

forbidden by Kátyáyana who says that sons belonging to a different caste are entitled to food and raiment only. Saunaka, also, recommends adoption within the adopter's caste and dissuades him from affiliating one belonging to a different class, and if he does, from giving any share of his property to such a son. But the rights of an adopted son of the above description, cannot be supposed to be conclusively settled by the passages of Saunaka and Kátyáyana, when he is the only son of his adoptive father: for, there is no reason why he should not occupy the same position as an *aurasa* son by a wife of the same caste with him, is entitled to under the Hindu law.[1]

There cannot be any doubt that imperfect adoptions like this owe their origin to the old notion of transfer of *patria potestas* not obtaining at the present day. If an adoption of this kind actually takes place, the best course to follow would be to declare it voidable at the option of the adoptee.

It has been held that inter-marriage as well as inter-adoption between different sections of the same caste is valid.[2] But on this subject one grave misconception generally prevails, namely, that all non-regenerate castes are all subdivisions of the Sudra tribe. It is imagined that as the Sudras were the lowest of the original four tribes, there cannot be any caste inferior to the Sudras. This is, however, not correct, for according to the Smritis, all the mixed castes supposed to have sprung from a father of an inferior class and a mother of a superior class are placed below the Sudras; and this is corroborated by the usages and customs of the people.

**Adoption of a disqualified person.**—Let us next see whether personal defects such as cause exclusion from inheritance, disqualify one labouring under them for being adopted. The commentators are entirely silent on the point. Mr. Sutherland, however, observes,[3] "It is an obvious inference, that the person selected should be exempt from any disqualification, which might prevent him fulfilling the purpose of the adoption." This inference appears to be supported by what Nanda Pandita says in the course of an argument.[4] A man would seldom if ever be disposed to adopt a disqualified, person; but if any one chooses to affiliate a son of that description, there is no reason why the law should stand in the way; the son adopted would be entitled to the same rights as an *aurasa* son similarly disqualified is entitled to. Suppose a man feels a particular liking for a blind relative, and adopts him as his son, gets him married and a grandson free from any defect is born to this blind son, then all the purposes of an adoption are fulfilled. Then again you should bear in mind that certain persons are excluded from inheritance, on account of moral delinquencies, which the *lex loci* Act favours by repealing the provisions of Hindu law can

[1] See Mitákshará ch. 1, Sec. 8; Dáyabhaga, ch. IX.
[2] See Lecture IV, *Supra*, p 164.
[3] Synopsis, Head Second, pa
[4] See Dat.-Mim. 2, 62.

their disinherison. The out-caste, however, who and whose issue are excluded from inheritance, is a person guilty of certain heinous offences; mere change of religion does not place a person under that category. Suppose, a Hindu married according to Hindu law, becomes with his wife a follower of the Bráhma religion, and subsequently many children are born to them; and suppose a brother of his, who is childless and remains a Hindu, wishes to adopt one of his sons, and he is willing to give one in adoption. The boy appears to be eligible for adoption in all other respects, excepting this that his father cannot make a ceremonial gift which, however, may vicariously be made by any other Hindu relative of the parties. As for any defect in the boy, that may attach to him in consequence of the fault on the part of his parents, it may be cured by an expiatory rite and the initiatory ceremonies which have the effect of removing all impurities derived from parents.

**Limitation from age and the performance of initiatory ceremonies.**— Neither in the Smrities nor in the commentaries on general law is there any restriction as to the age of a person, which limits his capacity of being adopted. On the contrary, an obvious inference may be drawn from the definitions of the *kritrima* and the self given sons, that there was no limitation of age for affiliation. The Vedik story of Sunahsepha's adoption proves that such restriction did not exist; for, according to the story, he took a prominent part in the performance of the ceremony which could be done by a person whose Upanayana rite had been performed.[1] It is, no doubt, desirable that the boy should be adopted at a tender age so that he might be thoroughly assimilated to the family into which he is adopted, and being bred up from his infancy amidst its members, be looked upon as a natural relation. The matter, however, was, as it properly should be, left to the discretion of the parties concerned, by the sages who did not lay down any rule on the point.

Nanda Pandita and some other modern writers have introduced certain restrictions upon the only authority of a passage of the Kálikápuráṇa,[2] the authenticity of which is doubted.[3] The limitation thus imposed upon the selection of the boy, arises, according to them, from his age, and from the previous performance of his initiatory rites in the family of birth. The purpose which the initiatory ceremonies serve, is, according to the sages,[4] the removal of the taint that may have been inherited by the son from his parents. According to the view taken by these modern writers, these ceremonies produce another effect, namely the unseparable connection of the boy to the *gotra* or family in the name of which some of these rites have been performed.

The passage[5] of the Káliká-Puráṇa lays down three rules: (1) that a boy

[1] Lecture V, *Supra*, page 181.

[2] Dat. Mím. 4, 22; Dat. Chand. 2, 25.

[3] Dat. Chand. 2, 25.

[4] Manu, II, 27; Yájnavalkya, I, 13.

[5] Dat. Mím. 4, 22; Dat. Chand. 2, 25.

upon whom the ceremony of tonsure has been performed in the family of his birth cannot be affiliated to another person, because the filial relation to the adopter arises in case the tonsure and the subsequent initiatory rites be performed upon the boy in his family, otherwise the relation of master and slave would be the effect; (2) that a boy cannot be adopted after he has completed his fifth year; and (3) that a person taking a boy in his fifth year must perform the *Putreshti* sacrifice.

Nanda Pandita in his Dattaka-Mímánsá discusses the construction of the above passage at considerable length.[1] He is of opinion *first*, that a boy though uninitiated with the ceremony of tonsure cannot be adopted if his age exceeds five years;[2] *secondly* that a boy though initiated with the ceremony of tonsure, may be adopted if he has not completed the fifth year of age;[3] but it is absolutely necessary to perform the *Putreshti* sacrifice in order to remove the status of slave,[4] and produce the filial relation; and even then the boy must be a *Dvyámushyáyana*[5] or son of two fathers, of the *Anitya* description,[6] that is to say, the son so adopted is not severed from his natural family by adoption, because the performance of the ceremony of tonsure in the family of his birth renders his connection to it unseparable, but this double relation is not permanent *(anitya)* so as to affect his issue who belong exclusively to the *gotra* of the adopter, for, it is in that family alone that their initiatory ceremonies are performed;[7] the reason assigned being that filial relation to a person proceeds from the performance of the initiatory rites upon the boy as his son.[8]

Jagannátha construes the passage as meaning that there cannot be a valid adoption of a boy who has completed the fifth year, or upon whom the ceremony of tonsure has been performed.[9]

The author of the Dattaka-Chandriká cites the texts enjoining the performance of the initiatory ceremonies for removing any inherited taint, which are to be performed by a father upon his son,[10] and concludes by saying that if the rite of investiture with the sacred thread alone be performed by the adopter the filiation of the Dattaka as son of the adopter is completed, but he adds that the adoption must take place before the expiration of the primary season for that rite; otherwise the adopter would not be competent to perform it, for one who is not competent to perform it in the primary season, cannot celebrate it in the secondary season.[11] The primary seasons are the eighth, eleventh, and twelfth

[1] Dat. Mím. 4, 23-56; 1 W. Macnaghten, 72.
[2] Dat. Mím. 4, 43.
[3] Dat. Mím. 4, 48-49.
[4] Dat. Mím. 4, 52.
[5] Dat. Mím. 4, 32.
[6] Dat. Mím. 6, 41.
[7] Dat. Mím. 6, 45.
[8] Dat. Mím. 4, 29.
[9] Colebrooke's Digest, Book V, *verse*, 273; Madras Edition Vol. II, pp. 391 *et seq.*
[10] Dat. Chand. II, 20-22; 1 W. Macnaghten, 72.
[11] Dat. Chand. 2, 23 and 31.

years counting from conception, for Bráhmanas, Kshatriyas and Vaisyas respectively;[1] and the secondary seasons are sixteen, twenty-two and twenty-four respectively.[2] In support of the above opinion the author relies upon the following text of Vasishtha.—"Sprung from one following a different Sákhá (or branch of the *Vedas*,) the Dattaka son even, when initiated into studentship, (or invested with the sacred thread) under the family name of the adopter himself, according to the form prescribed by his peculiar *Sákhá*, becomes participant of the *Sákhá* of the adopter."[3] The author cites the passage of the Káliká-Purána which is according to him spurious, and admitting it to be authentic construes it in a manner consistent with his own view mentioned above, to mean that if the boy has passed the fifth year or the tonsure has been performed, the *putreshti* rite must be performed and the tonsure repeated. As regards Sudras, performance of marriage in the family of the adopter would cause filial relation,[4]—and the celebration of it in the family of birth is a bar to adoption.

It should, however be observed that if you leave aside the passage of the Káliká-Purána the authenticity of which is doubted, then there is no authority in Hindu law for the proposition that any of the initiatory ceremonies must be performed in the adopter's family in order to cause filial relation, in other words, that if all or any of the initiatory rites for a person have been performed in the family of his birth, he becomes incapable of being adopted into any other family. The passage of Vasishtha relied upon by the author of the Dattaka-Chandriká does not lay down the rule that the *Upanayana* ceremony must be performed in the adopter's family, nor can such a rule be fairly inferred from it. Nor is there any passage of law declaring that in the case of Sudras, marriage is a bar to adoption. It should further be borne in mind that the Káliká-Purána which again is an *Upa-Purána* cannot legitimately be regarded as an authority in law.

The question therefore depends upon the opinion of the authors of the Dattaka-Mímánsá and the Dattaka-Chandriká. Mr. Sutherland understands the latter treatise to lay down that an adoption amongst the twice-born classes may take place even after the expiration of the primary seasons for investiture with the sacred cord, provided the ceremony has not been performed upon the boy.[5] But it seems that this view is not supported by the text.[6] The learned translator thinks that the *Puttreshti* or sacrifice for male issue would cure the defect; but the author expressly says that the performance of the tonsure by the adopter is possible in the secondary season, because it has been expressly provid-

[1] Mann, II, 36.
[2] Mann, II, 38.
[3] Dat. Chand. II, 23; Dat. Mím. VI, 49.
[4] Dat. Chand. II, 29 and 32.
[5] Dat. Chand. 2, 30 note.
[6] Dat. Chand. 2, 31 and note.

ed in the passage of the Káliká-Purana; there is, however, no authority for applying the same view to *Upanayana*.[1]

Independently of what is said in those treatises, the European authorities think that the performance of the *Upa-nayana* ceremony is an insurmountable bar to adoption, and they set forth the following reason,—"Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture, which causes the second birth, has already been performed in the family of the natural father."[2] This seems to be fallacious on the face of it, for if adoption be the second birth, and subsequently the *Upanayana* is performed, there must be a third birth. The ceremony means literally, *taking (the boy) near* (the preceptor), and really the commencement of study of the sacred literature, testifying to the spiritual nature of man as distinguished from his animal nature which is common to the lower animals as well as to illiterate and ignorant men. The attainment of knowledge, really constitutes the second birth which is figurately said to take place by that rite intended to lead to that result. The ceremony may be performed at the age of five or sixteen for a Bráhmana. And there is no reason why this ceremony, any more than the tonsure, be a bar to adoption, seeing that it has become a nominal ceremony and a mere farce, as is evidenced by what it is now generally understood to be, namely, 'investiture with the characterstic cord.'

**Case-law on the subject.**—As in other respects of the capacity of being adopted, so in this, the decisions of the different superior Courts are not uniform.

In Bengal the Pundits gave their opinion in some early cases[3] that a boy exceeding five years in age could be adopted if the tonsure had not been performed in the natural family, and that if after gift and adoption tonsure had been performed in the natural family it could not vitiate the adoption, possessing no effect whatever being an act done by one having no right to do it. But the Pundits do not seem to have followed the authority of the Dattaka-Chandriká according to which tonsure offers no obstacle, and its effects may be annulled.[4] In later cases it has been rather broadly laid down that an adoption amongst Súdras is permissible at any age previous to his marriage, and amongst the superior tribes *at any age* before investiture with the sacred thread.[5] Accordingly it was held that admitting the boy to have been of the age of *twelve* years

[1] Dat. Chand. 2, 31 and note.

[2] 1 W. Macnaghten, 73 note; 1 Strage's H. L., 90.

[3] *Keerutnaraen* v. *Mt. Bhobinesree*, 1 Beng. Sel. Reps. 213 (161); *Mussummaut Da'* v. *Manu Bibi*, 5 Beng. Sel. Reps. 61 (50.)

[4] *Sreemutty Joymony Dassee* v. *Sreemutty Sibosoondry Dassee*, Foulton, 75.

[5] *Bullabakant Chowdree* v. *Kishenprea Dassee*, 6 Beng. Sel. Reps. 270 (219); *Ram Dayee* v. *Bhola Nauth Dass*, Beng. S. D. A. D., 1853, 553.

at the time he was given in adoption, he being a Bráhmana and the nephew of the adoptive father, the initiatory ceremony of investiture not having been previously performed, his adoption was valid.[1] The adoption, however, has been declared invalid on some other ground. It should be observed that the rule laid down in the above case is clearly opposed to the Dattaka-Chandriká; it does, however, introduce a new factor, namely, that the adoptee being a nephew of the adopter, was a member of the same *gotra*. There appears to be a misconception about this subject, arising from the two-fold meaning of the word *gotra;* in one sense it means abstractly the family as composed of members descended in the male line from a common male ancestor who was an ancient Rishi after whom the *gotra* or family is named; and in the other sense it means, *lineage*. In all the passages in which a ceremony is required to be performed in the *gotra* of the adopter, what is laid down is that the boy should be described as son of the adopter when the rite is performed, and consequently as belonging to the adopter's *gotra*, in both senses. Hence the notion that the fact of the boy belonging to the gotra makes any difference is not strictly supported by the two leading treatises.

In Madras the rule has been further relaxed but on proof custom: and it has been held that according to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same *gotra*, after the Upa-nayana has been performed is valid.[2] The usage in Pondicherry permits an adoption after the Upa-nayana in any case.[3]

The Bombay High Court have adopted the view of Nílkantha and of his father Sankarabhatta,[4] and ruled that among all classes even a married man may be adopted whether he belongs to the same *gotra* with the adopter, or not.[5]

In the Punjab also no restriction of any specific age appears to obtain; and the Chief Court upheld the adoption of a son of the age of 30.[6]

So also in Mithilá no such rule is respected in the Kritrima form of adoption. The Pundits no doubt draw a distinction between that form and the Dattaka, and maintain that the restrictions relating to the capacity of being

[1] *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain*, Beng. S. D. A. D., 1859, 229 (236); affirmed on review, S. D. A. D. of 1860, Vol. 1, 485 (490.)

[2] *Vírarághava* v. *Ramalinga*, I. L. R., 9 Mad., 148.

[3] Mayne's H. L., § 129.

[4] Mandlik's Vyavahára-Mayukha, 58.

[5] *Rája Vyankatráv Anandrán Nimbálkar* v. *Jayantráv*, 4 Bom. H. C. R., A. C. J., 191; *Náthája Krishnája* v. *Hari Jágoji*, 8 Bom. H. C. R., A. C. J., 67; *Sadáshiv Moreshvar Ghâte* v. *Hari Moreshvar Ghâte*, 11 Bom. H. C. R., 190; *Lakshmappa* v. *Ramappa*, 12 Bom. H. C. R., 364; *Dharma Dagu* v. *Ramkrishna*, I. L. R., 10 Bom., 80.

[6] *Makhan* v. *Nikka*, unjab Records of 1868, Case No. 37, page 96.

adopted, that may obtain with respect to the Dattaka, do not apply to the Kritrima, in which form neither Upanayana nor marriage offers any obstacle to the adoption, and that the general usage prevailing there is to that effect.[1] It should be observed, however, that the Dattaka-Mímánsá maintains that these restrictions apply to the Kritrima adoption also;[2] but this view appears to be most unreasonable as being opposed to the very definition of the Kritrima son.

Nor is there any limit of age for adoption amongst the Jainas; their Pundits gave it their opinion that the age qualifying for adoption extends to the thirty-second year from conception.[3]

In a recent case[4] the Allahabad High Court have in an elaborate and learned judgment dealt with the question whether the restrictions from age and performance of initiatory ceremonies, laid down in the Dattaka-Mímánsá are imperative. There was an earlier ruling of that Court to the effect that a boy who has not passed his *sixth* anniversary could he adopted,[5] which, however, is inconsistent with Nanda Pandita's rule. Upon a review of the cases decided by other Courts, the Court has come to the conclusion that, according to the Hindu law as observed by the Benares School, the ceremony of *Upanayana* is the limit of time within which a valid adoption in the Dattaka form can take place, in other words, a person may be adopted at any age if the *Upanayana* has not been actually performed. The reasons assigned for this view are, that the ceremony of *Upanayana* represents the second birth of a boy and the beginning of his education in the duties of his tribe; adoption implies second birth in the adoptive family, and it cannot he effected after the boy's place in his natural family has become irrevocably fixed by the *Upanayana* representing his second birth. And consequently the ruling of the Bombay High Court, recognizing the validity of a married man's adoption is dissented from. In short the rules on the subject laid down in the two treatises on adoption are held to be directory, and therefore not followed, but an analogous rule is enunciated, which is partly based upon the mode of their reasoning on which those rules are founded.

**Result of case-law.**—These authorities are unanimous in rejecting the restrictions arising from age and initiatory ceremonies, that are propounded by Nanda Pandita and the author of the Dattaka-Chandriká. But if you once refuse to accept the view of these authors you have no other alternative than to adopt

[1] *Ooman Dutt* v. *Kunhia Singh*, 3 Beng. Sel. Reps., 192 (145); 1 W. Macnaghten, 76; 2 W. Macnaghten, 196; *Chowdree Purmessur Dutt Jha* v. *Hunooman Dutt Roy*, 6 Beng. Sel. R 235 (192); *Mussamut Shibo Koeree* v. *Joogun Singh*, 8 W. R., 155.

[2] Dat. Mim. 4, 25 and 47 note.

[3] *Maha Rajah Govindnath Roy* v. *Gulal Chand*, 5 Beng. Sel. Reps., 322 (276.)

[4] *Ganga Sahai* v. *Lakhraj Singh*, I. L. R., 9 All., 253.

[5] *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwar*, N.-W. P., H. C. R., 1868, 1

the view taken by the Bombay High Court; for, you cannot assign any cogent reason for adopting the middle course of importing a different restriction by taking the actual performance of the *Upanayana* ceremony as the ultimate limit. This view is, no doubt supported by the opinion of the European authorities, as well as by the *obiter dictum* expressed in several decisions which, though of very great weight, cannot be supposed to have settled the point. If you leave out of your consideration the passage of the Káliká-Purána, which you do when you reject the views of Nanda Pandita and of the author of the Dattaka-Chandriká, you have no authority declaring that any particular age or the performance of any initiatory ceremony is a bar to adoption. The *Upanayana*, no doubt means, the commencement of the *spiritual* education consisting in the study of the sacred literature, for it is and must be, always preceded by secular education preparatory to it. It has been said that this rite irrevocably fixes a person in his family of birth; but I have not been able to find any authority in support of this proposition, nor is there any special reason why this initiatory rite, any more than the others, should have that effect. The passage of Vasishtha, from which the author of the Dattaka-Chandriká deduces his rule on the point, does not as I have already told you, lay down any restriction whatever, it simply says that if the Sákhá of the Vedas, read respectively in the adopter's and the adoptee's family, be different, then the latter on his *upanayana* shall read the adopter's Sákhá of the Vedas. For instance, if a person in whose family the *Sáma Veda* is principally read adopts a son from a family following the *Yajur-Veda*, the son must read the Sáma Veda. When writing was not discovered, the Vedas used to be committed to memory and handed down orally by tradition from preceptor to pupil, and in consequence, there arose some slight difference of reading, the different readings being also denominated Sákhás. So the matter dealt with in Vasishtha's text dwindles into one of minor importance, at any rate it does, by no means, justify the inference, that *upanayana* is a bar to adoption. As to the argument drawn from the figurative second birth, it is not entitled to much weight; for, according to that view, you will have to admit a *third* birth in every adoption amongst the *twice-born* classes.

**Conclusion on capacity to be adopted.**—The capacity to be adopted has reference to several matters, namely, (1) the boy's status in his family of birth, such as his being the only or the eldest son, (2) preference based on relationship, (3) incongruous relationship, (4) caste and (5) age and initiatory ceremonies. The restrictions relating to it are of modern origin and rest entirely upon the authority of Nanda Pandita and other modern writers. None of them are observed in all parts of India; and with respect to a few, contrary views are entertained by the different courts. The territorial division of British India into different Provinces, each with a court of last resort, for convenience of

Government, has nothing whatever to do with the manners, customs and usages of the Hindus domiciled in them, in other words, they are not to be taken to be different by reason only of the territories being within the jurisdiction of the different highest courts. Except in Madras and southern portion of the Deccan where great laxity prevails, the prohibitted degrees for marriage are almost the same amongst the Hindus in the rest of Hindustan, so far as they appear from the Sanskrit commentaries. The language of the people of Northern India is the same excepting in Orissa, Bengal proper, and its eastern hilly districts. The manners, customs and usages of the people of Behar and of the Punjab, at least in its eastern districts, are the same as amongst the Hindus of the N.-W. Provinces. There are marriage alliances contracted between the Hindu residents of these localities. The Mahárashtra Bráhmanas also have close connection with those of Benares. Under such circumstances it seems most anomalous that the adoption of a daughter's or sister's son should be valid if made by a Brahmana of Mithila, of Delhi or of Madras, but invalid when made by one in Bombay or Allahabad; and an adoption of an only son should be lawful in Madras, Mithila, N.-W. Provinces and the Punjab, but not so in Bengal, Behar or Bombay. It seems to be equally anomalous to hold that the restrictions relating to the capacity to be adopted, are recommendatory so far as they are based on preference on account of proximity of relationship, and on age or initiatory ceremonies; but imperative as regards those that are founded on incongruity of relationship: the distinction between them being drawn on the ground of the applicability or otherwise of the doctrine of *factum valet.*

The Allahabad High Court considered in a recent case the applicability of the doctrine of *factum valet* to adoptions, and the substance of what is laid down by that Court upon a review of the previous decisions upon the point is stated as follows,[1]—"The maxim *quod fieri non debuit factum valet* is applicable not only in the Dáyabhága school of the Hindu Law which prevails in Lower Bengal, but also in the various subdivisions of the Mitákshará school. Its authority does not depend upon any rule of Hindu law alone, but upon the principles of justice, equity and good conscience. There is no authority to show that it is to be applied to cases governed by the Hindu law in a manner exceeding the limits recognized by the Roman civil law in which it originated. Its application in cases of adoption should be confined to questions of formalities, ceremonies, preference in the matter of selection, and similar points of moral or religious significance, and which relate to what may be termed the *modus operandi* of adoption, but do not affect its essence. There may be cases where ma s which in other systems would be regarded as merely formal are, by the ex s letter of the text made matters affecting the essence of the transaction, l

[1] *Ganga Sahai* v. *Lekhraj Singh*, I. L. R., 9 All., 253 (254).

such texts may be sufficiently imperative to vitiate an adoption in which they have been disregarded; but unless their meaning is undoubted, the doctrine of *factum valet* should be restricted to adoptions which, having been made in substantial conformity to the law, have infringed minor points of form or selection. Adoption under the Hindu law being in the nature of a gift, it contains three elements—capacity to give, capacity to take, and capacity to be the subject of adoption—which are essential to the validity of the transaction, and, as such, are beyond the scope of the doctrine of *factum valet*."

The court in dealing with the above question has omitted to take into consideration the one important point in which the Hindu law differs from the Roman law, namely, that the former is believed to be divine in its origin, and that there is a commingling of religious and civil rules. Hence the doctrine of *factum valet* as laid down by the Sanskrit writers, must exceed the limits recognized by Roman law and other systems moulded thereon, which are of a different character, and in which the doctrine must be limited to mere matters of form. The Hindu lawyers had to differentiate between rules of legal and religious obligation, and I have already discussed[1] the principles laid down by them with regard to the applicability of the doctrine. An adoption being in the nature of a gift, the doctrine is applicable to it, to the same extent as to alienations of property by an owner; and the capacity to be the subject of gift, should accordingly be within, instead of beyond, the scope of the doctrine of *factum valet*. Agreeably to the above exposition, the ruling of the Allahabad and the Madras High Court that an only son may be adopted, would be erroneous, nor could the restrictions based on age and initiatory rites, or the preference based on relationship, be admitted to fall within the scope of the doctrine, since these concern the capacity to be adopted. The distinction drawn between the different ingredients relating to that capacity, upon the ground of some being minor points and others essential, or of some being of legal and others of religious significance, seems to be arbitrary in the absence of any tangible principle underlying the same. The conclusion which seems to be irresistible is, that all the restrictions relating to the capacity to be the subject of adoption are of moral or religious obligation, seeing that they are not found in the admitted sources of Hindu law, that they are not noticed by the authoritative commentators on the general law, that they are innovations found only in the works of Brahmanical writers of the seventeenth century, who were not lawyers but religious teachers, that even according to these writers the gift is not ineffectual, creating as it does the state of slavery instead of filial relation, that they are not universally observed by the Hindus, and that there is divergence as well as fluctuation of opinion amongst the different superior Courts with respect to their binding character.

[1] Lecture IV, *Supra*, p. 146 *et seq.*

LECTURE IX.

## FORMALITIES AND CEREMONIES NECESSARY FOR A VALID ADOPTION.

Formalities for adoption—Gift and acceptance absolutely necessary—Gift and acceptance must be accompanied by actual delivery—Constructive delivery not sufficient—Deeds of gift and acceptance though registered are not alone sufficient—Conditional acceptance by a widow and fraud upon the power—Conditional gift and gift for a valuable consideration—Gift in Dvyámushyáyana form—Ceremonial adoption and religious ceremonies—Homam in the case of Sudras—Religious ceremony in the case of twice-born females—The same amongst the regenerate tribes—Where and when the Homam to be performed—Puttreshti or sacrifice for male issue.

**Formalities for adoption.**—The Hindu legislators prescribe the very same formalities and ceremonies for affiliation of a son, as for marriage. Both the institutions were originally founded on the selfsame principle, and were attended with consequences bearing a close resemblance to each other. In both there was the transfer of *patria potestas* or paternal dominion over the child, which passed to the adopter in the one case and to the husband in the other, so that in Roman law the wife was deemed to be the *daughter* of her husband as regarded the power which he could exercise over her and which was identical with that of a father over his child. But as the mere formalities for the transfer of dominion, such as gift and acceptance, or sale and purchase, would indicate no more than the passing of the dominion from the one person to the other, and must also take place when the child was transferred for a slave, it was absolutely necessary that there should be additional formalities showing that the transaction was intended for creating the relation of father and son in the one instance, and of husband and wife in the other. The sages have accordingly ordained for these institutions, ceremonies stamping a sacred character on them, marking their importance, and giving them the widest publicity. Invitation of kindred on both sides, ceremonial gift and acceptance, and the *Homa* or burnt sacrifice are the formalities common to both.

Vasishtha,[1] Baudháyana,[2] and Saunaka[3] declare the mode of affiliating a son. All of them require that notice should be given to the king (or the [illegible]'s representative in the village), and that the kindred should be invited, th[illegible]e-

[1] Vasishtha, Ch. xv, 9; Datt.-Mím.. 5, 31; Dat.-Chand., 2, 11.

[2] Dat.-Mím., 5, 42; Dat.-Chand., 2, 16.

[3] Dat.-Mím., 5, 2-30; Dat.-Chand., 2, 1-9; *Supra* page 308.

sence serves two purposes, namely, they become witnesses to the transaction, as well as acknowledge the son adopted as their relation. These sages also agree in prescribing the performance of the *Vyáhriti-Homa* or the burnt-sacrifice in honour of all the gods presiding in the different regions of the universe; it is thought necessary for effecting the change of lineage, for, how can one man's child become another's son except through the intervention of all the gods? Vasishtha does not say anything about the mode in which the gift and the acceptance are to be made, which therefore may according to him be made in the ordinary secular way. But Baudháyana and Saunaka also describe the manner in which the gift and the acceptance are to be made. According to the former, the adopter is to beg of the natural father, the gift of his son; thereupon he is to declare,—'I give, you accept him;" whereupon the adopter is to declare,—"I accept thee for the fulfilment of religion, I take thee for the continuation of lineage;" and this is intended as a solemn pledge by the adopter to treat the boy as his son. Saunaka appears to require that the natural father should be asked through a priest to give his son in adoption, and fixes an exorbitant fee for the officiating priest; he further requires that Bráhmanas should be invited and fed: in fact his work being one on ritual was composed for the benefit of the priestly class, and has been thrust into prominence by writers who were rather priests than lawyers. He seems to give further details of the ceremonial prescribed by Baudháyana.

According to these sages, gift, acceptance and the homa or burnt-sacrifice appear to be the three essential ceremonies in the adoption of a son; of these, the gift and acceptance must precede the *homa*, and may be made in the ordinary way without the Sanskrit formula, the burnt-sacrifice being performed afterwards. But the general practice appears to be that all these ceremonies are performed according to the prescribed ritual; the secular gift and acceptance, however, must always take place first, and in some cases there may be reasons for postponing the ceremonial adoption, such as, impurity of the giver or adopter, or the inauspiciousness of the season, which may render the ceremonial gift and acceptance impossible, though there cannot be any impediment to the subsequent performance of the *homa* or burnt-sacrifice.

The convention of kindred, though usually made, and the representation to the king, which are mentioned by these sages as part of the procedure, appear to be intended for giving publicity to the transaction and are not considered essential for the validity of an adoption.[1]

The Dattaka-Mímánsá,[2] after citing and commenting on the passages of Saunaka and Vasishtha prescribing the ritual, says, "Therefore, the filial rela-

[1] *Alank Manjari* v. *Fakir Chand Sarkar*, 5 Beng. Sel. Rep., 418 (356); *Narhar Gobind Kulkarni* v. *Narhar Vathal*, I. L. R., 1 Bom., 607.

[2] Section V.

tion of these five sons proceeds from adoption only, with observance of the form of either Vasishtha or Saunaka; not otherwise."[1] The ceremonial prescribed by Baudháyana is stated to be applicable to the followers of the Black Yajur Veda.[2] The subject is concluded thus, "It is therefore established, that the filial relation of adopted sons, is occasioned only, by the proper ceremonies. Of gift, acceptance, a burnt-sacrifice, and so forth, should either be wanting, the filial relation even fails."[3] The author appears to specify the essential ceremonies, and the expression (*ádi*,) "and so forth" seems to be unmeaning, as it is often found to be in argumentative Sanskrit works. It should be observed that this ceremonial applies not only to an adoption in the Dattaka form but also to an affiliation in the Kritima and other forms.[4]

The Dattaka-Chandriká[5] cites the same passages and maintains that the form prescribed by Vasishtha or Saunaka is indispensable;[6] and the same opinion is expressed about the text of Baudháyana, as in the Dattaka-Mímánsá.[7]

It may be inferred from what is stated in these treatises, that the secular gift and acceptance followed by a burnt-sacrifice would be sufficient for a valid adoption. It is worthy of remark, however, that in almost all undisputed adoptions,[8] as in all marriages, the prescribed ritual is observed by all classes. But there is one important point of distinction between the two institutions, namely, that in a marriage which as a general rule takes place in the house of the damsel's father she is actually given only in the course of the ceremonial of marriage though it is preceded by a verbal betrothal, whereas in an adoption which generally takes place in the house of the adopter, there may be actual gift and acceptance in the secular form to be followed by the prescribed ritual at a subsequent time. The essentials of a valid adoption are therefore divisible into secular and religious ones: and although all the essential formalities may be, and generally are, observed in the religious mode, yet a valid gift and acceptance must also fulfil the secular requirements or the legal conditions of the same. Let us therefore, proceed to consider first these secular essentials of an adoption.

**Gift and acceptance absolutely necessary.**—The giving and receiving are indispensably necessary; they are the operative part of the ceremony of adoption, whereby the parental interests are transferred from the natural to the adoptive parents, and without which an adoption in the Dattaka form is impossible.[9] The definitions of the Dattaka son, given by different sages, however, do not expressly say anything about acceptance, but simply declare that the gift

[1] Dat.-Mím, 5, 50. [2] *Idem*, 5, 42. [3] Dat.-Mim., 5, 56. [4] Dat.-Mím., 5, 47
[5] Section ii, 1-13. [6] Dat.-Chand., 2, 13 & 17. [7] *Idem*, 2, 16; Dat.-Mím., 5, 4
[8] *Sutrooghun Sutputhy* v. *Sabitra Dayee*, 2 Knapp's Rep., 287; 5 W. R., P. C., 10
[9] *Veerapermall Pillay* v. *Narrain Pillay*, 1 Strange's notes of cases, 91; 1 Morley ... st, Adoption case 68; 1 Strange's H. L., 95.

by the parents to a person constitutes the child the *dattaka* son of the latter. I have already told you that, according to the Bengal school, in the case of donations of property, the relinquishment by the donor of his rights in favour of a sentient being is alone sufficient to create the donor's right to the property, subject only to his dissent; and it is not acceptance or positive assent, but absence of dissent which is requisite for completing his title. This theory, however, is opposed to the Mitákshará as well as to the transfer of property Act, according to which acceptance is necessary for the completion of a gift.[1] However that may be, the gift in adoption cannot be looked upon as the donation of property, and is, besides, one of a conditional and onerous nature, the child being offered for acceptance as a son; so it cannot be complete and effectual without the positive assent of the donor, and the general presumption that a man would accept what is purely beneficial to him, cannot arise in the present instance; acceptance manifested by some overt act, therefore, is absolutely necessary. But the doctrine that the adoption of a son is spiritually beneficial to the adopter has an important bearing on this question of acceptance; for, we have already seen, that a minor is held to be competent to accept a son in adoption, and to give an authority for that purpose; and upon the same principle it is said that a man of weak intellect, who has not on that account sufficient testamentary capacity, may be of sufficient capacity to adopt, inasmuch as adoption is a religious and necessary act.[2] Probably a minor would also be competent to give away a son in adoption, there being no express prohibition against it. There is, however, an express provision in the Succession Act[3] that a minor father may by will appoint a guardian for his child, though it has not been extended to Hindus.

**Gift and acceptance must be accompanied by actual delivery of the child.**—The natural father's expressed consent to give a son in adoption does not amount to a gift,[4] nor the adopter's intention to adopt expressed in a document, to an acceptance.[5] The gift and acceptance in adoption are to be made by the corporeal delivery of the child. On this subject the Judicial Committee observe[6] as follows:—"That being so, it is unnecessary for their Lordships positively to decide the first question, namely, whether there can be, according to Hindu law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the Dattaka form. They desire, however, to

[1] Transfer of Property Act, section 122; Lecture VII, *supra* page 293.

[2] *Baboo Banee Pershad* v. *Moonshee Syud Abdool Hye*, 25 W. R., 192.

[3] Section 47.

[4] *Bashettiappa* v. *Shivlingáppa*, 10 Bom. H. C. R., 268.

[5] *Mahashoya Shosinath Ghose* v. *Krishna Sundari Dassi*, 7 Calcutta Law Reports, 313; L. R., 7 I. A., 250; I. L. R., 6 Calc., 381.

say that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law even in a case of Sudras by mere deed, without an actual delivery of the child by the father.* * * The mode of giving and taking a child in adoption continues to stand on Hindu law, and on Hindu usage, and it is perfectly clear that amongst the twice-born classes, there could be no such adoption by deed, because certain religious ceremonies, the Datta-homam in particular, are in their case requisite.* * * It would seem, therefore, that according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption."

**Constructive delivery not sufficient.**—The same view was taken by the Calcutta High Court in an earlier case,[1] in which the secular and religious elements of the rite of adoption were distinguished, and secular gift and acceptance were taken to be sufficient for deciding the question: Justice Phear made the following observations on the point,—"Jagannath appends to his quotation from Vasishtha, which I have already referred to, a long discussion of the question, whether or not the secular and religious portions of the ceremony are separable, and it is obvious throughout that he considers the secular portion to be intended for the purpose of passing the paternal property in the son, from the one father to the other; and that he thinks it would be effective to that extent at any rate, even if the religious supplement were omitted. Without stopping to inquire into the value of his conclusions on these points, I will observe that he all along supposes an actual, and not a constructive, giving and receiving to have taken place. And the words of every one of the old authorities (see for instance those of Vasishtha, above quoted,) imply the same thing. I need not examine them in detail. It is obvious that a mutual transfer of the boy from the one father to the other is everywhere contemplated as constituting the giving and receiving which is spoken to. But here, if all that the witnesses for the defence stated did actually take place, about which I have my doubts, the giving and receiving was at most symbolical or constructive. The thing given was in fact hundreds of miles distant from the giver and receiver. And, although an advanced state of civilization recognizes abstracting of property in goods and chattels as distinct from the subject-matter thereof, and allows of these rights being passed from hand to hand, so to speak, by the mere parol expression of intention on the part of the persons interested, without the sence of the thing itself, I think I should go beyond the warrant of any au rity if I imported this doctrine of law to govern by analogy the transfer

[1] *Siddessory Dassee* v. *Doorgachurn Sett*, 2 Indian Jurist, N. S., 22.

even what Jagannatha abstracts as the paternal proprietary right of the father in his son. I think that the transaction of giving and receiving is not complete for the purpose of adoption, unless the boy given is actually present, and given over from the one parent to the other, and consequently I am of opinion that what took place at Dehra Dhoon, in this case, did not in any degree amount to a valid adoption."

**Deeds of gift and acceptance, though registered not sufficient.**—According to Hindu law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity.[1] It is often found that when an adoption takes place, deeds of gift and of acceptance are executed by the natural father and the adopter respectively in favour of each other; and sometimes though made in anticipation of the intended adoption, the terms show as if the boy has already been given and accepted; and such deeds are also registered.[2] But from what has been laid down in the above cases[3] it is clear that in the absence of gift and acceptance accompanied by actual delivery of the child in adoption, such deeds are worthless and insufficient by themselves to constitute a legal adoption, although they may be used as corroborative evidence of actual gift and acceptance which must otherwise be proved to have taken place. In this respect the gift of a son in adoption is to be distinguished from the gift of property, which may be effected by a registered instrument.[4]

The Oudh Estates' Act, I of 1869, requires the writing by which an authority to adopt a son is exercised by a widow to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered.[5]

**Conditional acceptance by a widow, or fraud upon the power.**—We have seen that an authority or even a direction given by a deceased husband to his widow for adopting a son, imposes simply a moral duty on the widow who cannot be compelled to adopt a son, and whose personal interest is opposed to her duty, as her life-interest in her husband's estate would be divested by the adoption of a son. This conflict between interest and duty is sometimes sought to be reconciled by the execution of an agreement by the natural father before adoption to the effect that his son being adopted by the widow, would not be entitled to the estate during her life, but she should remain in possession in the same way as if no son were adopted, subject only to the son's maintenance and education.[6] Whether such an agreement is binding on the son adopted is a

[1] *Sutroogun Sutputty* v. *Sabitra Dye*, 5 W. R., P. C., 109.

[2] *Nagendro Chandro Mittro* v. *Sremutty Kishen Soondery Dassee*, 19 W. R., 133.

[3] 25 W. R., 129; 7 C. L. R., 313: 2 Ind. Jur., (n. s.) 22.

[4] Transfer of Property Act, IV of 1882, section 123.

[5] *Bhasba Rabidat Singh* v. *Indar Kunwar*, I. L. R., 16 Calc., 556.

[6] *Chitko Raghunáth Rájádiksh* v. *Jánaki*, 11 Bom. H. C. R., 199.

different question, to be discussed later on. What we are at present concerned with is, whether such conditional acceptance by the widow affects the validity of an adoption.

In one case[1] it was argued before the Privy Council that the adoption was a fraud upon the authority to adopt, and therefore void, on the following facts:—"The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document, dated the 26th of October 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharajah. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th December 1883. But some months afterwards, on the 28th of March 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death."

The objection was overruled, and it was held by the Judicial Committee that such condition could not vitiate the adoption, as will appear from the following passage of their judgment,—"The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. Arathoon, that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. Arathoon appealed would rather suggest that, even in that case, the adoption would have been valid and the condition vo

**Conditional gift, and gift for a valuable consideration.**—Some[illegible]t analogous to a conditional acceptance of the above description, is a gift f[illegible] a

[1] *Bhasba Rabidat Singh* v. *Indar Kunwar*, I. L. R., 16 Calc., 556.

valuable consideration either in the shape of a sum of money, or any other property received before adoption or in the form of an agreement executed by the adopter stipulating that the natural father is to get a maintenance allowance out of the adopter's property, upon the faith of which he parts with his child by giving him in adoption. I have already told you that in the majority of cases, some sort of valuable consideration is given by the adopter to the natural father for inducing him to give away his son. And such arrangement does not appear to be open to any reasonable objection. It may no doubt be argued that if any consideration is received by the natural father for giving his child in adoption, the gift would virtually be a sale of the child, and as the *krita* or purchased son is not recognized in the present age, the adoption itself would be invalid.

The argument would have been sound if the word "gift" in Hindu law had been limited only to the transfer of a thing made voluntarily and without any consideration. But we find on the contrary that the sages include under the term "gift" what is given for a valuable consideration. Thus, a text of Nárada[1] cited in the Mitákshará, when dealing with the topic of litigation entitled Rovation of Gift includes under the seven kinds of lawful gifts, the gift of anything in lieu of the price of an article purchased from a shop-keeper, what is given in return for a benefit received from the donor, and the bride's price, (sulka,)[2] or what is received for giving a girl in marriage. A gift of a child, in return for any benefit received from the adopter, therefore, is not contrary to Hindu law, and cannot be supposed to be equivalent to a sale.

It has, however, been held[3] that a contract whereby the adopter agreed to make an annual allowance to the natural parents in consideration of their giving their son could not be legally enforced by the natural father. The reasons assigned for this decision are set forth in the following passage :—

"The son given, that is, the Dattaka son, is defined in the Dattaka-Chandriká section 1, para. 12,—'He is called a son given whom his father or mother affectionately gives as a son, being alike;' alike being explained to mean, of the same class. Now it could not be said, if this contract were carried out, that the boy has been affectionately given; a gift, of course, implies an act without consideration.

"Then with reference to section 23 of Act IX, (Contract Act) we think that the principle of that section is applicable to this case, as this contract, if it were capable of being carried on and were recognized by the Court, would involve an injury to the person and property of the adopted son, inasmuch as if it could be proved that the boy was purchased and not given, it is very probable

[1] Nárada-Smriti, fourth topic of litigation, verse 8; Mitákshará on Yájnavalkya II, 176.

[2] Mitákshará, 2, 11, 6.

[3] *Eshan Kishore Acharjea Chowdhry* v. *Hurish Chunder Chowdhry*, 21 W. R., 381.

that the adoption would be set aside, and if such adoption were set aside, he would not only lose his status in the family of his adopting father, but also lose his right of inheritance to his natural parents, and such a contract would therefore involve an injury to the person and property of the adopted son."

Here the Court lays down that gift in adoption must be without consideration, that payment of any consideration would invalidate the adoption, as the son would not be *given* but *purchased* who is not recognized in the Kali age, and that the contract *if enforced* would invalidate the adoption. It is difficult to understand why the adoption itself should not be invalidated by the contract upon the above premises; the agreement is not enforced because its object is unlawful, but this void agreement formed the consideration of the gift in adoption, which was not made affectionately and without consideration; hence it would seem that the gift itself was void, or there was no legal gift at all, and the boy would not lose his status in his natural family.

In another case,[1] however, where the natural father of the son given in adoption gave his consent to the adoption on certain conditions, it was held that the non-fulfilment of one of the conditions rendered the adoption invalid, notwithstanding that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption. In this case the condition was required to be fulfilled before adoption.

**Gift in Dvyámushyáyana form.**—The gift of a child in adoption may be so made as to constitute him the common property or son of both the donor and the donee. The formalities must be the same as in the case of an absolutely adopted son or *Suddha-Dattaka*, but an understanding or a previous stipulation between the natural father and the adopter to the effect, that the child should belong to both of them, would constitute him Dvyámushyáyana or son of two fathers. A son so adopted is called *Nitya*-Dvyámushyáyana, *i. e.*, perpetual or absolute son of two fathers, because he and his descendants would continue to belong to both the gotras or families.[2]

But an express stipulation does not appear to be absolutely necessary for constituting the child given in adoption, the son of two fathers. For, the Dattaka-Mímánsá says that if the ceremony of tonsure has been performed upon a boy in the natural family and he is subsequently given in adoption, he will become a Dvyámushyáyana or son of two fathers, by reason only of that ceremony having been performed in the family of his birth, which has the effect of impressing upon him the indelible character of a member of that family, not liable to be removed by his adoption into a different family. This double relation is not due to any contract, but arises as the effect of the initiatory ceren

[1] *Rangubai* v. *Bhagirthibai*, I. L. R., 2 Bom., 377.

[2] Dat. Mim. 6, 48; Dat.-Chand. 2, 24; Mitákshará, 1, 10, 5 *et seq.*

and therefore it attaches only to the son so given and not to his descendants upon whom all the initiatory rites are performed in the family of the adopter. Hence he is called the *anitya-Dvyámushyáyana*, or temporary son of two fathers.[1]

So also, it appears that a stipulation to that effect may be implied, from the circumstances of the case. The Mitákshará expressly says that if a brother or any other man destitute of male issue be appointed to raise issue on another person's wife, the son begotten would belong to him as well as to the husband of the woman.[2] As an exception to this rule the Mitákshará provides that when the person appointed has male issue, then the son begotten by appointment would not belong to him in the absence of express stipulation.[3] Hence it follows that if an only son be given in adoption, he would be a Dvyámushyáyana son of both the adopter and the natural father, even without any express stipulation. In the case of an only son of a brother, it is maintained in the Dattaka-Mímánsá and Dattaka-Chandriká[4] that he alone and no other should be adopted; and in answer to the objection raised upon the ground of Vasishtha's rule against the gift of an only son, it is said that he would be the son of both brothers, and so the rule or rather its reason, is not violated. There is no mention of any express stipulation. It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage[5] he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the Mitákshará with respect to the analogous case of a son produced by a man other than the brother, on another man's wife. The Dattaka-Chandriká, however, does not appear to limit the Dvyámushyáyana adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases.[6]

**Ceremonial adoption and religious ceremonies.**—The next question that we have to consider is, whether in addition to the secular gift and acceptance, anything more is absolutely necessary for a valid adoption, in other words, whether the ceremonial gift and acceptance and the *Homa* ceremony are requisite. As regards ceremonial gift and acceptance, it may be observed that they express in Sanskrit what people do in the vernacular language when making a secular gift or acceptance, with this difference that Saunaka requires the recital of certain Vedik texts as part of these ceremonies; but as the recital of the Vedik texts is dispensed with in an adoption made by a Sudra, or by a woman of the twice-born classes having the requisite authority for the same, it cannot be regarded as absolutely necessary. Hence it follows that the secular gift and

[1] Dat.-Mim. 4, 32; 6, 41, *et seq.*
[2] Mitákshará, 1, 10, 1-1.
[3] *Idem*, 1, 10, 4.
[4] Dat. Mím. 2, 38; Dat. Chand. 1, 22-28.
[5] Dat. Mím. 2, 39.
[6] Dattaka-Chandriká, 1, 28; 3, 17; 5, 33.

acceptance are sufficient, and the question is reduced to this, namely, whether the Homa ceremony is indispensable.

I have already told you that the religious ceremonies are usually performed by all classes. This usage may not of itself be sufficient to establish that they are absolutely necessary for a legal adoption, although it is undoubtedly an important factor for the consideration of our Courts when dealing with the question of the *factum* of a disputed adoption. We have also seen that the two special treatises insist upon the performance of the *Homa* ceremony as indispensably necessary, and there are many other Sanskrit writers holding the same opinion; but considering that their authors were writers of the priestly class and interested in thrusting into prominence the necessity of celebrating religious ceremonies, one would not be disposed to attach much importance to their opinion unless it be supported by the authority of the lawgivers. Let us therefore see whether the sages require the performance of the Homa ceremony as being the *sine qua non* of a valid adoption.

From the definition given by the different sages, of the Dattaka son, it appears to be clear that nothing more than gift and acceptance is necessary for an adoption in the Dattaka form. In defining the Dattaka son, Manu says that the gift is to be made *together with water (adbhih)*, or as Sir W. Jones puts it, *the gift being confirmed* by *pouring* water; thus the chief of the sages ordains the simplest procedure that is even now followed when the gift of any property is made in the religious form, as for instance to a priest officiating at a religious ceremony. It may no doubt be said that the codes of the different sages are to be taken as supplementing each other, and that when Vasishtha has declared the ritual of affiliation, it ought to be read as part of the definition of an adopted son, and the mention of *water* in Manu's text indicates the fuller form propounded by Vasishtha.[1] The correctness of this argument, must be tested by its applicability to other descriptions of subsidiary sons, for Vasishtha's text is general. Manu does not say anything in the definitions of other descriptions of sons, which may be construed to indicate the necessity of the observance of form. Nanda Pandita maintains upon the authority of a text of Vriddha Gautama[2] that the ritual applies to all the five descriptions of adopted sons.[3] But if *Homa* be necessary in their case why should it not be so in the case of other kinds of subsidiary sons, for instance the damsel's son, the appointed daughter's son and the adulterous wife's son; but it cannot be reasonably maintained that these will not be filially related unless Homa be performed. If filial relation in these cases arises by operation of law without the intervention of the *Homa*, why should it not also similarly arise in the case of the Dattaka son by means of the gift and acceptance only? Besides, Vriddha Gautama simply

[1] Dat. Mím. 5, 47. [2] *Idem.* [3] Dat. Mim. 5, 50.

says that the Dattaka and the like sons acquire filial relation by observance of *form*; and Nanda Pandita admits that the *form* intends gift and so forth that are comprehended in the descriptions of the son given and the like, but contends that the word *water* in Manu's text intends the whole religious ceremony. Thus by putting a forced construction, he invokes the authority of Manu for contending that the religious ceremony is necessary. He omits to take into consideration that in the definition of the Dattaka son, as given by the other sages including Vasishtha and Baudháyana, there is nothing to indicate the performance of any religious rite.

When all the lawgivers describe the Dattaka son in such a manner, as to show that gift and acceptance only are sufficient, and only two of them, namely, Vasishtha and Baudháyana propound in a different part of their Codes a ceremonial for affiliation; the proper construction of the law appears to be that the *Homa* ceremony is intended not as legally essential, but as religiously meritorious. Manu introduces the subject of partition of heritage amongst the twelve descriptions of sons by the following passage,—"Of the twelve sons of men, whom Manu, sprung from the self-existent, has *described*, six are kinsmen (or members of the father's *gotra*) and heirs; six, not heirs, but kinsmen."[1] Then, after specifying the sons falling within the two sets of six,[2] and declaring their relative rights of inheritance,[3] he describes the twelve kinds of sons,[4] and goes on to say,—"These eleven sons beginning with the wife's son, *as described* are declared by wise legislators to be substitutes for sons of the body, for the sake of preventing a failure of obsequies."[5] Now, it is clear that as religious ceremonies form no part of the descriptions of the subsidiary sons, these sons become substitutes of the son of the body, and members of their adoptive father's *gotra*, without them. And this view is supported by what is declared by the same highest authority with respect to the religious ceremony prescribed for marriage, which is analogous to adoption; for, he ordains,[6]—"The recitation of holy texts, and the sacrifice (*Yajna*=*Homa*) in honour of (*Prajá-pati*) the lord of creatures, are used in marriages for the sake of procuring good fortune to the brides; but the gift by the father is the cause of the husband's marital dominion." Similarly it follows that the gift by the father is the cause of the adopter's parental dominion and the recitation of the holy texts and the Homa ceremony are used in adoptions for the sake of procuring good fortune to adoptees. The ceremony ordained by Manu for marriage appears to be as simple as for adoption, for he says,—"Amongst the sacerdotal class, the gift of daughters in marriage, with (the previous pouring into the hands of the bridegroom of) water alone, is most approved; but amongst the other classes (it may be done) according to their

[1] Manu IX, 158.
[2] Manu IX, 159-160.
[3] Manu IX, 162-165.
[4] Manu IX, 166-178.
[5] Manu IX, 180.
[6] Manu V, 152.

mutual pleasure."[1] In another connection he does, no doubt, refer to the recitation of holy texts in marriages,[2] but we have already seen his explanation of the purpose for which it is done.

Jagannátha[3] maintains that the gift and acceptance only are essential, and that the Homa or "oblation to the fire with holy words from the *Veda* is an *unessential* part of the ceremony; even though it be defective, the adoption is *nevertheless* valid; for no one admits that the principal object is unattained if an *unessential* part be defective."

Jagannátha suggests a very important argument against the position that the *Homa* is necessary; for, if you say that the performance of the *Homa* is essential, then you cannot but admit that it must be accurately, properly and completely performed; and if there be any defect in its performance, it cannot serve the purpose: but if you say that even a defective *Homa* is sufficient, you necessarily admit that it is not essential. As for the perfect performance of the *Homa* ceremony, it is impossible in Bengal where the priests do not learn how to recite the Vedik texts properly.

Hence the opinion of Nanda Pandita and others that the *Homa* is indispensable, appears to be unsupported by authority.

**Homam in the case of Sudras.**—If the *Homa* be considered to be an essential ceremony of adoption, it must be regarded as necessary in an adoption amongst the Sudras also. The Sudras occupy the same position as the females of the twice-born classes, with respect to the ceremonies performed by the recitation of the Vedik texts.[4] Neither the Sudras nor women can personally perform the Homa ceremony which requires the recital of Vedik texts, as they are not entitled to the privilege of reciting passages of the Vedas. Hence in an adoption made by them, the Homa ceremony is to be performed vicariously by the priests appointed by them for the purpose;[5] and as regards the Vedik texts to be recited in giving or taking, they are dispensed with in the case of Sudras and women, unless those ceremonies also be performed vicariously.

There had been conflicting opinions and decisions upon the question whether *Homa* ceremony is necessary in an adoption amongst Sudras, which were all considered by a Full Bench of the Calcutta High Court, and it was held that amongst Sudras in Bengal, no ceremonies in addition to the giving and the taking of the child are necessary to constitute a valid adoption.[6] This decision

[1] Manu III, 35.

[2] Manu VIII, 227.

[3] Colebrooke's Digest, Bk. V, ch. IV, S. VIII; Madras Edition, Vol. II, 389 *et s*

[4] Dat. Mim. 1, 27; Vyavahára-Mayukha, page 57, Mandlik's Edition.

[5] Vyavahára-Mayúkha, 56, Mandlik's Edition; Raghunandana's Ashtávinsa. ra, Vol. II, p. 63, Serampore Edition; Nirnaya-Sindhu p. 215 (Bombay edition of 1883.]

[6] *Behari Lal Mallik* v. *Indromani Chowdhrani*, 25 W. R., 285; 13 B. L. R., F. B.

has been affirmed on appeal, by the Privy Council.[1] Following this decision, and upon an examination of the authorities, it has been held by the Madras High Court that among Sudras no religious ceremonies are essential to an adoption, and consequently an adoption by a Sudra widow under pollution is not invalid.[2]

**Religious ceremony in the case of twice-born females.**—The Sudras and women labour under the same religious disability; and the necessary logical consequence of the ruling that *Homa* is not essential to an adoption made by a Sudra, would be that it is not necessary also in an adoption by a widow of a Bráhmana or any other regenerate person, for she, like a Sudra, can neither recite the *Vedik* prayers nor personally perform the *Homa*. And the religious ceremonies should, therefore, be dispensed with in her case for the same reasons as in the case of Sudras. It is held by the Madras High Court that the performance of the *Datta-Homam* is not essential for a valid adoption, in the case of an adoption by a Bráhmani woman, but upon the general ground that the giving and receiving are sufficient to constitute a valid adoption, according to Hindu law, even amongst Bráhmanas.[3]

**The same amongst the twice-born classes.**—Following this ruling it has been held that among Kshatriyas in the Madras Presidency adoption without religious ceremonies is valid.[4] In a subsequent case,[5] however, the Madras High Court questioned the correctness of their previous decision, and expressed an opinion that amongst Bráhmanas the ceremony of Datta-Homam is an essential element in adoption. But recently a Full Bench of that Court have held,[6] following Mr. Ellis's opinion,[7] that the ceremony is not essential to a valid adoption among Bráhmanas in Southern India, when the adoptive father and son belong to the same *gotra*. Mr. Ellis draws a distinction between Bráhmanas and the two other regenerate tribes, and between an adoption within the adopter's *gotra* and one beyond it, and maintains that the *Datta-Homam* is necessary only in an adoption by a Bráhmana of a boy belonging to a different *gotra*. There is, however, no clear authority supporting this view.

A Full Bench of the Allahabad High Court have held[8] that in the case of Dakhani Brahmins, the *Datta-Homam* or any other religious ceremony is not

[1] *Indramani Chowdhrani* v. *Behari Lal Mallik*, I. L. R., 5 Cal., 770; 6 C. L. R., 183; L. R., 7 I. A., 24.

[2] *Thangathanni* v. *Raun*, I. L. R., 5 Mad., 358.

[3] *Singamma* v. *Vinjamuri Venkatacharlu*, 4 Mad. H. C. R., 165.

[4] *Chandramala Patti Mahadevi* v. *Muktamala Patti Mahadevi*, I. L. R., 6 Mad., 20.

[5] *Venkata* v. *Subhadra*, I. L. R., 7 Mad., 548.

[6] 2 Strange's H. L., 104 and 218.

[7] *Govindayyar* v. *Dorasámi*, I. L. R. 11 Mad., 5.

[8] *Atmaram* v. *Madho Rao*, I. L. R., 6 All., 276.

required to give validity to an adoption of a brother's son: the giving and taking of the child is sufficient for that purpose. Reliance is placed on the text of Yama, declaring that *Homa* and the like ceremonies are not necessary in an adoption of a daughter's or brother's son.[1] It should be observed, however, that if this text be applied to Bráhmanas, then the adoption amongst them of a daughter's son must be held valid.

No religious ceremony is required in the Punjab[2] nor amongst the Jainas.[3]

But on the other hand there is a catena of authorities and cases in which the performance of religious ceremonies is stated to be an essential element in an adoption amongst the twice-born classes, if not also amongst the Sudras.[4] As regards the Sudras the law has been settled by the Privy Council, but as regards the twice-born classes the question appears to be beset with difficulty. If you admit that the religious ceremonies may be dispensed with in some particular cases amongst the regenerate tribes, they must cease to be essential elements in an adoption. It is difficult to understand the reason why they should not be necessary when the adopter and the adoptee belong to the same *gotra*,[5] if they be so in other cases. Perhaps it is thought that the religious ceremonies are necessary for effecting a change in the *gotra*, and therefore they are not required when the gotra is the same. This seems to be due to a misconception; for, *gotra* in the present connection means "state of lineage"[6] and not "connection by the same general family;"[7] hence in every adoption there must be a change of the *gotra* or state of lineage, and the observance of *form*, whatever it may mean, is necessary even when the boy is connected by the same general family.[8]

**Where and when the Homa to be performed.**—The *Datta Homam* and

[1] *Huebut Rao Mankur* v. *Govindrao Bulwunt Rao Mankur*, 2 Borrodaile, 83.

[2] Tupper's Punjab Customary Law, Vol. III, 82.

[3] *Lakmi Chand* v. *Gatto Bai*, I. L. R., 8 All. 319.

[4] See in addition to works already referred to, treatises on adoption in Pundit B. C. Siromoni's Dattaka-Siromani, and *Alanka Manjari* v. *Fakir Chand Sarkar*, 5 Beng. Sel. Reps., 418 (356); *Bullubakant Chowdree* v. *Kishenprea Dassea Chowdrain*, 6 Beng. Sel. Rep. 270 (219); *Dyamoyi Chowdhrain* v. *Rasbeharee Singh*, Beng. S. D. A. R., 1852, p. 1001; *Perkash Chunder Roy* v. *Dhun Monee Dassea*, Beng. S. D. A. R., 1853, p. 96; *Bhyrub Nath Tye* v. *Mohesh Chunder Bhadoory*, 13 W. R., 168, 4 B. L R., A. C. J., 162; *Sayamalal Datta* v. *Saudamini Dasi*, 5 B. L. R., 362: *Nittyanundo Ghose* v. *Kishen Doyal Ghose*. 15 W. R., 300; *Luchma Lall* v. *Mohan Lall Bhaya Gayal*, 16 W. R., 179; *Rávji* v. *Lakshmibai*, I. L. R., 11 Bom., 381.

[5] *Nittianund Ghose* v. *Kishna Dyal Ghose*, 15 W. R., 300; *Govindayyar* v. *Doraisami*, I. R., 11 Mad., 5.

[6] Dat. Mím. II, 5.

[7] *Idem*, II, 7.

[8] *Idem*, II, 4.

similar religious ceremonies are usually performed in the dwelling house of the adopter, and in describing the ritual of adoption Vasishtha,[1] Baudháyana[2] and Saunaka[3] all mention the adopter's dwelling house as the place where the *Homam* is performed, in fact Hindus are attached to their ancestral homestead supposed to be presided by the Vastu-devata, and regarded with a sort of religious feeling as the sanctified place for the performance of religious rites. But there does not seem to be a restriction that the *Homam* cannot be performed anywhere else, and accordingly it has been held that although the ceremony of *Homa* is an essential part of adoption, it is not necessary that it should take place in the dwelling of the adopter.[4]

The ceremonial gift and acceptance and the *Datta-Homam* form part of the same transaction; but I have already told you that the secular gift and acceptance followed by the *Datta-Homam* appear to be sufficient. In such a case the religious ceremony may be performed some time after the gift and acceptance,[5] and in one case the performance of the religious ceremony five years after secular adoption was held sufficient.[6]

**Putreshti or sacrifice for male issue** is required to be performed in addition to the *Datta-Homam*, in cases where the ceremony of tonsure has already been performed upon the boy in the natural family, in order to undo its effects.[7] It is not necessary in all cases. In one case, however, it is laid down that the performance of the *putreshti jag* is essential to the validity of an adoption in the Dattaka form, at least among the three superior tribes.[8] Here the term *putreshti* seems to have been used by mistake for *Datta-Homam*.

[1] Dat. Mim., V, 31.
[2] *Idem*, V, 42.
[3] *Idem*, V, 21.
[4] *Oomrao Singh* v. *Mahtab Koonwar*, 3 Agra Reps., 103.
[5] *Indromoni Chowdhrani* v. *Behari Lal Mullick*, I. L. R., 5 Calc., 770; 6 C. L. R., 183; L. R., 7 I. A., 24.
[6] *Venkata* v. *Subhadra*, I. L. R., 7 Mad., 548.
[7] Dat. Mím. IV, 49 and 52.
[8] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal*, 16 W. R., 179.

LECTURE X.

## EFFECT OF ADOPTION ON THE STATUS AND INHERITANCE OF THE ADOPTEE.

Status of the adopted son—Gotra relationship—Sapinda relationship—according to Mitákharé—according to Dáyabhága—Gotra and Sapinda relationship of an absolutely adopted son—Prohibited degrees for an adopted son's marriage—Adopted son's impurity on deaths and births—Srâddha rites—Adopted son's Kulinism—Adopted son cannot inherit from his natural relations—Adopted son's vested rights before adoption—Guardianship of an infant adopted son—Smritis and commentaries on adopted son's inheritance in the adoptive family—The modern law of adopted son's right of inheritance—Adopted son's share—Adopted son's rights as against the adopter and in the joint family—Ante-adoption arrangement curtailing adopted son's interest—Adoption by widow and devesting—Vesting and devesting according to the Mitákharé and the Dáyabhága—Widow's estate devested—Estate inherited by adopting widow from her son—Divesting of co-widow's estate—No other heir is devested—Devesting when widow of a member of a Mitákharé joint family adopts under express authority of the husband—Conclusion as to devesting by adoption—Relation back of adoption, and alienation by widow before adoption—Adoption *pendente lite*—Rights of the adopted son of a disqualified person.

**Status of the adopted son.**—The Dattaka son has become a very great favourite of our Courts of justice, and the result of the decisions relating to his rights of inheritance in the family into which he is adopted shows that the principle enunciated and acted upon is, that he is entitled to all the rights and privileges of a real legitimate son, unless he is *expressly* deprived of any one of them. But this is rather attributable to the modern principle of equity, which could not tolerate the idea that a man should lose all his rights in his family of birth and not acquire them in the family of his adoption, and raised every presumption in his favour. Equality of rights, however, was a thing unknown amongst the caste-ridden Hindus, and the adopted son's position, according to the Sanskrit commentators is far inferior to that of a real legitimate son, and his capacities, rights and duties have been dealt with by them as being based upon express passages of law, and in no respect is he considered by any Sanskrit lawyer to hold the same position as a son of the body. There are several religious and social matters, which have not, nor are likely ever to, come to be decided by our Courts, and the status of the adopted son in those respects remains unchanged. The status of Hindus in relation to other persons as regards matters of both law and ritual, is determined by two kinds of relationship, namely, connection by *gotra*, and connection as *sapinda*.

**Gotra-relationship.**—In ancient times greater importance was attached to the *gotra* or agnatic connection, than to mere relationship by blood, when

latter did not co-exist with the former. Persons connected by the same gotra or general family are supposed to be descended in unbroken lines of males only, from the *rishi* or founder of the gotra after whose name it is called. People belonging to the four castes are found to have the same *gotras;* and from this it may be inferred that the caste system was not founded at its inception upon any tribal distinction, but upon a division according to professions and callings, by which the supposed descendants of the same persons were placed in the different castes. The Brahmanical writers, however, would not admit this theory common descent, but maintain that the Bráhmanas having a common *gotra*, only are descended from the original rishi, and the persons of the lower castes having the same *gotra* are not to be supposed so descended, but derive the title from their Vedik teachers or priests, and have no *gotra* of their own. Whether this explanation as to how the other castes came to have the same *gotras* with the Bráhmanas be true or fanciful, the fact is that all the castes have *gotras*, in other words, are composed of groups of persons, each of which has a separate *gotra*. Marriage within the same *gotra* is prohibited, be the relationship ever so distant; and this rule testifies how strong the tie of gotra relationship was. If not entirely artificial from its inception, it is admittedly so to some extent, for females born in it pass out of it on marriage, and women of other families espoused by its members, become affiliated to it; and the description of some of the subsidiary sons shows that they belonged to the *gotra* of which their mothers were members; and we have seen that strangers may by adoption become its members.

**Sapinda-relationship** is used by the Sanskrit writers in two senses; in one sense it means *consanguinity*, and in the other, connection by funeral oblation of food. The word *sa-pinda* literally means *of the same pinda*, and *pinda* means either body or funeral cake.[1]

**According to the Mitákshará.**—Vijnánesvara while explaining Yájnavalkya's texts[2] on marriage, maintains that sapinda-relationship is based upon consanguinity and not on presentation of funeral oblations, that the wives also of male sapindas become, on marriage, connected as consanguineal sapindas; and that wherever the word sapinda is used, it means a consanguineal relation. Further on, he says that as in this sense the most distant relations also are included under the word sapinda, therefore the lawgiver having enjoined marriage with a damsel who is not related as sapinda, limits sapinda-relationship to those only who are within seven degrees on the father's and five degrees on the mother's side, by adding,—"After the fifth on the mother's, and after the seventh on the father's side." And he explains this text by saying that a man may espouse a damsel who is beyond the fifth and seventh on the mother's and father's side respectively, because the sapinda-relationship ceases with them.[3]

[1] Dat. Mím. 6, 32. [2] Yájnavalkya I, 52-53. [3] West and Buhler, 120 *et seq.*

It should, however, be observed that the above limitation of sapinda-relationship on the mother's side relates to marriage alone. In fact the prohibited degrees for marriage are considered by the Sanskrit writers to constitute sapindas for the purpose of marriage, and they are different according to different sages. For instance, Vasishta declares that a man may marry a girl who is *fifth* and *seventh* on the mother's and father's side respectively, whilst Paithínasi says that a damsel may be espoused who is beyond the *third* on the mother's, and *fifth* on the father's side.[1] But seven degrees on both sides appear to be prohibited by Manu, for he declares that a man must not marry a girl who is sapinda to his mother,[2] and lays down generally in another place that sapinda-relationship ceases with the seventh ancestor.[3] It is, however, inferred from some general expressions used by Vijnánesvara while explaining the limitation, that it applies even to inheritance.[4] But those expressions appear to be used relatively to marriage only, and do not lead to the conclusion that the limitation is laid down as being one applicable for all purposes.

On the contrary the Sanskrit lawyers maintain that Manu's rule laying down that the sapinda-relationship ceases with the seventh ancestor, is applicable to both the paternal and maternal side, when no distinction is expressly declared. Thus the Dattaka-Mímánsá, while explaining Saunaka's text providing that a son should be adopted from amongst sapindas, says,[5]—"'from amongst sapindas,' that is, from amongst kinsmen extending to seven degrees; and the term *sapinda* being used without any distinction, it follows, 'from amongst such kinsmen belonging to the same or a different *gotra*.'" This appears to be supported by the Mitákshará itself; for, when explaining sapinda-relationship with respect to inheritance it cites[6] the passage of Manu, but does not refer to the above text of Yájnavalkya on marriage. In dealing with the Sapindí-karana ceremony,[7] Vijnánesvara repeats his position that sapinda-relationship does not depend on presentation of funeral oblations, cites the text of Manu ordaining that sapinda-relationship ceases with the seventh ancestor, which he maintains to be based on consanguinity, and endeavours to reconcile this text with the fact that in the ceremony under consideration the funeral oblation of a deceased person is united with those of his three ancestors only, by saying that the deceased's oblation is mediately connected with the seventh ancestor inasmuch as the Sapindí-karana ceremony of his third ancestor was made with the latter's three ancestors, of whom the sixth was one. There is, however, no mention made in this connection, of Yájnavalkya's passage on marriage.

[1] Mitákshará on Yájnavalkya I, 53. [2] Manu, III, 5. [3] Manu, 5, 6
[4] *Lallubhai Bapubhai* v. *Mankuvarbai*. I. L. R., 2 Bom., 388. [5] Dat. Mím.
[6] Mitákshará, II, 5, 5-6. [7] Mitákshará on Yájnavalkya I, 25.

**The author of the Dáyabhága** contends[1] that for the purpose of inheritance sapinda-relationship must be taken to mean connection by funeral oblations, and that it extends to three degrees on the father's side and three degrees on the mother's father's side. As regards the sapinda-relationship extending to seven degrees, declared by Manu, he says[2] that it relates to marriage, impurity, and so forth, and not to inheritance with respect to which Manu has laid down a different rule.

The Bengal School takes the word sapinda in both senses, namely, connection through body and connection through funeral oblations: the former being limited to six degrees, and the latter to three degrees. The later writers of the Mitákshará school, also, adopt the Bengal view of connection through funeral oblation only, as being the sapinda-relationship applicable to adopted sons.

**Gotra and sapinda relationship of an absolutely adopted son.**—An absolutely adopted son, like a married woman, ceases to be a member of his natural father's gotra or general family, but retains the consanguineal sapinda-relationship to the family of birth.[3] The adopted son's sapinda-relationship to his natural relations in the sense of connection through funeral oblation, also ceases. Thus Manu ordains,[4]—"A given son must never claim the family (*gotra* or filial connection) and the estate of his natural father; the funeral cake follows the family and estate, but from him who has given away his son, the funeral oblation passes away."

An adopted son acquires the filial relation to the adopter and consequently becomes a member of his *gotra*, in the same way as the wife belongs to her husband's *gotra;* but, unlike a married woman who becomes the consanguineal sapinda of her husband and his sapindas, the adopted son does not become the adopter's sapinda in the sense of connection through the same body.[5] He becomes the adopter's sapinda in the sense of being connected through the funeral oblations, and this sapinda-relationship based upon express texts, extends only to three degrees in the adopter's family, and determines prohibited degrees for marriage, the period of mourning, and so forth, in which an adopted son is concerned.[6]

**Prohibited degrees for an adopted son's marriage.**—From what is stated above, it follows that an adopted son cannot espouse a damsel in his natural family who is related to him as sapinda, nor one born in the *gotra* or the family of the adopter nor a female sapinda by adoption, or one connected by funeral oblation, in other words, one who is within three degrees of descent from the adoptive father and his two paternal ancestors.

It should be observed, however that if a near relation be adopted, the above

[1] Dáyabhága XI, 1, 39. [2] Dáyabhága XI, 1, 41-42. [3] Dat. Mím. 2, 8.
[4] Manu, IX, 142. [5] Dat. Mim. 6, 17. [6] Dat. Mím. 6, 32-38.

rules must be subject to modification according to the circumstances of each case. A dvyámushyáyana adopted son, cannot marry, also a natural relation within the prohibited degrees.

**Adopted son's impurity on deaths and births.**—The absolutely adopted son is not polluted by impurity at all on the death or birth of any member of his natural family. Some writers, however, would make an exception in respect of the death of the natural parents. In the family into which he is adopted, the period of impurity is only three days in the case of sapindas, the ordinary period for a real legitimate son is, 10, 12, 15 or 30 days for Bráhmanas and other castes respectively; but if he performs the cremation ceremony of his adoptive parents, then he is to observe the full period of mourning. These rules, however, do not apply when a sapinda of the same *gotra* is adopted, who will be subject to the ordinary rules. A son of two fathers will have to observe the ordinary period of pollution in his natural family. Conversely, the sapinda relations by adoption are to observe the short period of pollution on the death of the adopted son, or on the death or birth of a descendant of his.

**Adopted son's competency to perform Sráddha rites.**—If after adoption a son is born to the adopter, then the adopted son cannot perform the sixteen Sráddhas[1] ending with the Sapindi-karana Sráddha, which are to be performed by the real legitimate son. Subject to this restriction he can perform all the other Sráddhas like the Aurasa son, with this exception, however, that the Sráddha on the anniversaries of the day of death must be performed by him in the Ekoddista form, *i. e.*, in honour of the deceased only, but by a *ságnika* Aurasa son in the Párvana mode in which a double set of three oblations are presented. A son of two fathers will have to perform the necessary Sráddhas in both families, and when performing the ceremony in the Párvana form, must offer four sets of three oblations.

It should be noticed that an adopted son cannot offer divided oblations or wipings of oblations to the third, fourth and fifth ancestors of the adoptive father, when he performs the Sráddha in the Párvana form.

In the Párvana-sráddha the adopted son is to present oblations to his adoptive mother's father and two other ancestors.[2] But when a bachelor or a widower adopts, there is great difficulty as to who would be the adopted son's maternal grandsires; the correct view perhaps would be to present oblations to the paternal ancestors alone; for the object of the rite is to honour them, and not the maternal ancestors, and there are occasions in which no oblations can be presented to the latter.[3]

[1] They are the Ádya or first Sráddha, the twelve monthly Sráddhas, the six-monthly Sráddha, the Vársika or first anniversary Sráddha and the Sapindí-karana.

[2] Dat. Mim. 6, 50; Dat. Chand. 3, 17.

[3] Dat. Chand. 1, 25

**Adopted son's kulinism.**—According to the rule[1] of the Kulinism prevailing in Bengal, the adopted son is not entitled to the respectable position of a Kulína adoptive father, which is descendible only to a son of the body. A Kulina family cannot, therefore, be maintained by adoption, and a family when represented by an adopted son, would cease to be Kulína.

**An adopted son cannot inherit from his natural relations.**—According to ancient law, heritable right was limited to the members of the same *gotra* or general family and a cognate was not at first recognized as an heir at all. We have already seen that according to Manu an adopted son cannot claim the family *(gotra)* and estate of his natural father, the two go together; by ceasing a member of the *gotra*, he loses his right of inheritance in the same.[2] It should however, be borne in mind that the adopted son's consanguineal sapinda-relationship with his natural relations subsists; the only effect of which is said to be, that he cannot marry a natural female relation within the degree of sapinda connection. But, when he retains the sapinda-relationship, he becomes a *bandhu* or *bhinna-gotra-sapinda* or a cognate according to the Mitákshará, and in that character may claim to inherit from his natural sapinda relations. There is no reason for limiting its effect in the above way excepting this, that upon the supposition that he loses all his rights in his natural family, he has been invested by the modern development of law, with similar rights in the family into which he has been adopted. The same argument, however, would not hold good under the Dáyabhága according to which consanguineal sapinda-relationship is not the principle of inheritance.

In some districts of the Punjab, an adopted son does inherit from his natural father if there be no heir of the common stock to exclude him, and in some others he is entitled to share in the estate of his natural father dying without other sons.[3]

**Adopted son's vested rights before adoption.**—According to the Mitákshará law, a son acquires by birth a right to the ancestral property in the possession of the father, and an undivided co-parcenery interest is vested in him as a member of the family corporation. The vesting, however, is imperfect as the interest is liable to variation and also to extinction by reason of any subsequent disqualification. The interest is acquired in the character of a member of the family, and when that character is lost by adoption, the interest also ceases. In this way you may explain as to how a Mitákshará son on being given away by his father in adoption loses his vested interest in the ancestral property.

But the question assumes a different shape when the boy is full owner of

[1] दत्तपत्रे कुलं नास्ति = Kula continues not in the *Datta-putra*.

[2] *Duttnaraen Singh* v. *Ajit Sing*, 1 Beng. Sel. Rep., 26.

[3] Tupper's Punjab Customs, Vol. III, p. 83.

any property such as what was inherited by him from his maternal grandfather or uncle before adoption. There appears to be no reason why a child given in adoption should be divested of property of which he is the absolute master at the time of affiliation. An adoption does, no doubt, cause a complete change of lineage, put an end to the status arising from the natural relationship, and extinguish the capacity of inheritance in the character of a relation by birth; but it is nowhere represented to be equivalent to civil death so as to extinguish the adopted son's existing proprietary rights.

**Guardianship of an infant adopted son.**—The adoptive parents are the legal guardians of the child during his minority. If the adoptive parents be dead, then it would be desirable to appoint a natural relation of the child as guardian of his person in preference to a relation by adoption, who may have an interest in determining the life of the adopted son and in whom the safeguard of natural love and affection may not be expected.

It has been held that the natural father of the adopted child is not his guardian so that he might be his guardian *ad litem* without being appointed as such by the Court.[1] But a suit instituted by the natural mother as next friend of her child given away in adoption for the protection of his interests was held to be maintainable.[2]

**Smritis and commentaries on adopted son's inheritance in the family of adoption.**—We have already seen[3] that the lawgivers deal with the status of the twelve descriptions of sons, together. They declare that all the sons become *bandhu* or members of their legal father's *gotra*, and as such may offer funeral oblations of food, and libations of water.[4] But they divide the twelve sons into two sets of six, of whom the first six are declared to be heirs to their father as well as to the kinsmen or members of the *gotra*, and the second six to the father alone; the sages, however, do not agree in including the same six in the two groups into which they divide the twelve sons. For instance the Dattaka son is included by Manu as one of the first six, but by Devala as one of the second six.

It is really difficult to reconcile these conflicting texts. The modern commentators who recognize the Dattaka son as the only subsidiary son that may now be affiliated, and consider the texts so far only as regard him, endeavour to reconcile them by holding that an adopted son if endowed with excellent qualities is entitled to inherit from the father as well as from *bandhus* or kinsmen, but one who is not so, becomes heir to the father alone. This distin n

[1] *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dasee*, 11 B. L. R., 171; L, R., Sup. Vol., 149; (S. C.) *sub nomine* Nagendro Chunder Mitter, 19 W. R., 133.

[2] *Mussammaut Dullabh De* v. *Manu Bibi*, 5 Beng. Sel. Rep., 61.

[3] Lecture II, *supra* p. 59 *et seq.*

[4] Mitákshará 1, 11,

appears to be based upon the analogy of the following passage of Manu,—"Of a man whose adopted son is adorned with every virtue, that son shall take his estate, though brought from a different family."[1] This text, however, suggests another ground of discrimination, namely, that a boy adopted from the adopter's own *gotra* agreeably to the rules of preference in selection, is entitled to inherit from kinsmen, but not if brought from a different family. The possession or destitution of good qualities, only is referred to by the commentators for explaining away the conflict.

Jagannátha says that it appears to be the present practice for a given son of virtuous conduct to take the inheritance of his paternal uncle and the rest.[2] So the author of the Dattaka-Chandriká maintains that the conflicting doctrines of the different sages, some of whom hold that the given son is heir to kinsmen, and others that he is not such heir, are to be reconciled by referring to the distinction of the adopted son's being endowed with good qualities or otherwise, and holds that by the expression "his being heir to kinsmen," means, his succession to the estate of *sapinda* kinsmen, as well as, to that of the father.[3]

The Mítákshará also attributes the variation which occurs in the institutes of sages, respecting the rights of the subsidiary sons, to the difference of good and bad qualities.[4] Referring to Manu's text declaring that the first six sons (the Dattaka being one of them) are heirs and kinsmen[5] Vijnánesvara says that it must be expounded as signifying that the first six may take the heritage of their *father's sapindas* and *samánodakas* if there be no nearer heir; but not so the last six: however, the status of kinsman, *i. e.*, the capacity of performing the rites of offering libations of water and so forth, on account of relationship as sapinda and sagotra, belong to both alike.[6] And he adds[7] that all the sons without exception, have a right of inheriting their father's estate, according to Manu, because in another passage the sage declares,—"Not brothers, nor parents, but sons, are heirs to the estate of the father."[8]

Kulluka Bhatta in his gloss on the institutes of Manu explains the passage[9] in the same way as Vijnánesvara, thus,—"The first six become *bándhavas* or kinsmen and heirs to the *gotra* or persons connected by the same general family; hence, by reason of being kinsmen they perform the rites of offering oblations of food, libations of water, and the like, to the sapindas and samánodakas; and in default of nearer heirs take the heritage of the *gotra;* because the right of inheriting the father's estate, has been affirmed of the twelve descriptions of sons without exception in the subsequent passage,[10]—'sons are heirs to the estate of the father.'"

[1] Manu IX, 141. [2] Colebrooke's Digest, Book V, verse 280. [3] Dat. Chand. 5, 22.
[4] Mitákshará, 1, 11, 28 and 34. [5] *Idem.* 1, 11, 30. [6] *Idem.* 1, 11, 31.
[7] *Idem.* 1, 11, 33. [8] Manu IX, 185. [9] Manu IX, 158. [10] Manu IX, 185.

It should be observed that all the sons without exception are competent to offer oblations of food and libations of water, and yet six of them are not recognized to become heirs to any relation by adoption except the father. The doctrine of spiritual benefit, therefore, does not furnish any test for determining the heritable rights of secondary sons.

The author of the Dáyabhágá does not notice the conflict, but simply cites the text of Devala[2] after having given the same enumeration of the twelve sons, as is given by that sage, according to which the Dattaka son is included in the second six; and adopts the rule laid down by the sage, which he explains thus,[3]—"The true legitimate son and the rest, to the number of six are not only heirs of the father but also of kinsmen, that is, of sapindas and the like: the others are successors of their father but not heirs of sapindas and the like." It has all along been understood that according to the Dáyabhága, the Dattaka son is entitled to become an heir of his adoptive father alone, and of no other relation by adoption; but in a recent case[4] the Calcutta High Court accepted an argument whereby a different construction was put, according to which, it was contended, the adopted son would fall within the first six. The argument was based upon the explanatory remarks upon Devala's text, made by Srikrishna in his commentary on the Dáyabhága. Devala says that, of the twelve sons, some are *átmajas* or sprung from the man himself, some are *parajas* or sprung from another, some are *labdhas* or acquired by an overt act, and some are *Yádrichchhikas* or filially related without it. From this it does not follow that the twelve sons are intended to be divided into four different classes, for a son must be either sprung from the man himself or from another person, and must be either adopted by an overt act, or not so. Srikrishna, however, says that *átmajas* are the real legitimate son, the son of a twice-married woman and the appointed daughter; the *parajás* are sons of the wife; the *labdhas* are the given son, the son bought, the son of the pregnant bride, the unmarried damsel's son, and the son made; and *Yádrichchhikas* are the deserted son, the self-given son, and the secretly produced son of the wife. This interpretation cannot be accepted as correct, for the word *parajás* or sprung from another person is in the plural number, and should therefore include at least three descriptions of sons, but Srikrishna includes only the wife's son under it; besides, if the word *parajás* or sprung from another person is to be limited to a son begotten on a wife of one person by another man, then why should not the son of the pregnant bride and the secretly begotten son of the wife also, be included under it? However, the argument put forward upon the basis of the above comments of Srikrishna was, that ere is another enumeration implied by Devala, of the twelve sons, in wh the

[1] Dáyabhága X, 7. [2] See *supra* p. 62. [3] Dáyabhága, X, 8

[4] *Puddo Koomaree Debee* v. *Juggut Kishore Acharjee*, I. L. R., 5 Cal., 615.

Dattaka son occupies the fifth position, and therefore he being one of the first six is entitled to inherit from kinsmen. But Srikrishna himself does not deduce that conclusion, nor does he explain the passage of the Dáyabhága in which the relative rights of the subsidiary sons are dealt with.

The rule laid down in the Dáyabhága, according to which an adopted son is entitled to inherit from the adoptive father alone, cannot be supposed to be inconsistent with justice or equity. For, if the usage of adoption to which the Dattaka son owes his existence, were universal, that is, if all persons destitute of male issue adopted sons, collateral succession itself would be impossible; therefore the law of adoption itself is opposed to the Dattaka son's right of inheriting from collaterals. Besides, the possibility of collateral succession which again is merely contingent, is not taken into account when an adoption takes place; the certain right of inheriting from the adoptive father is understood on behalf of the adopted son, to be an ample compensation for all the rights lost by him in his natural family; in fact, the rich inheritance of the adoptive father is accepted to be more than all the contingent and the certain rights put together in the natural family. Moreover, there is no reason why one person should be permitted to choose an heir for others: a person may, against the wishes of his relatives, choose to adopt a perfect stranger; and he should be at perfect liberty to appoint an heir to his own property in any way he pleases; but is it not inequitable to concede to this stranger the right of becoming an heir to the adopter's relations? In fact, such an adoption seems to be like the testamentary disposition made by one person, not only of his own property, but also of the property of all his relations under certain contingencies.

It should be observed that the other commentators who recognize the adopted son's right of succession to collaterals, make it conditional and require that he must be endowed with virtues and excellent qualities in order that he may be entitled to inherit from the adoptive father's relations. Then again the highest right of inheritance conferred upon him by Vijnánesvara and Kulluka, is confined to succession within the adopter's *gotra;* there is no authority recognizing his right to inherit from a relation belonging to a different *gotra.* The inheritance according to Hindu law, is determined by two principles, namely, the *gotra* relationship and the blood-relationship; and as the adopted son as such is not a consanguineal relation, his claim to inherit from a relation by adoption, who is beyond the gotra, is therefore supported by neither of the principles. His sapinda-relationship in the family of adoption appears to be misunderstood in consequence of the different senses in which the word is used. He becomes a sapinda in the sense of one connected through the funeral oblation of food; and the persons with whom he is so connected are primarily the three paternal ancestors by adoption; for, it is with their funeral oblations that his funeral oblation is united by the Sapindi-karana ceremony; and, as the funeral oblation of three male de-

scendants in the male collateral line, of each of these three ancestors, is united in the similar ceremony performed for them, with the oblation of one or more of those very ancestors, they are also in a secondary sense similarly connected. Hence an adopted son becomes a sapinda only to twelve relations of the adopter's *gotra* including him. The adopted son does, no doubt, offer oblation to the adoptive mother's father and other ancestors, but that does not make him their sapinda, because there is no union or connection of his pinda or funeral oblation with theirs.

We have already seen that in all other respects the adopted son's status in the adoptive family is based upon express texts; and although he is represented as the substitute for the real legitimate son, yet none of the Sanskrit writers appear to lay it down that he is entitled to all the rights and privileges of the real legitimate son. There are, however, several passages in Sutherland's translation of the Dattaka-Chandriká, which appear to be of that effect; one of which is as follows,[1]—"Next, the funeral rites, performed by a son given, are determined. In respect to these, although the son given, be first adopted, yet the legitimate son existing, he is not competent, to officiate in the sixteen funeral repasts, ending with the *sapindí-karana;* for, his superiority in rank is barred by Devala [who says,] 'A real legitimate son being subsequently born, superiority of rank from age does not vest in them.' And a text of Yájnavalkya, recites,—'Amongst these, the next in order, is heir and presents funeral oblations, on failure of the preceding. *Otherwise, the adopted son, in every respect resembles the real legitimate one.*'"—The learned translator has erred in thinking that the original of the italicized words is a part of the text of Yajnavalkya, and also in translating it in the way he has done. Whereas the original चतत्र सर्व्वत्र चौरसवत् is the author's own words, and the correct rendering is,—"In all other (Sráddhas, the Dattaka son is competent to officiate) like the real legitimate son." All that the author means to say is, that barring the sixteen Srádhas ending with the *sapindí-karana*, the Dattaka son is competent to perform all other Sráddhas, like the aurasa son. Similarly the following passage in Sutherland's translation is misleading,—"Thus, the son of the wife, the son given, and the rest, receive the share prescribed for them, *by the general law.* For, grounds for contracting the operation of the same, are wanting."[2] The expression *general law* has been taken[3] to refer to the general law of inheritance, such as is contained in chapter II of the Mitákshára or chapter XI of the Dáyabhága; whereas the correct meaning of the original of the passage is, "the general rule relating to the inheritance of the subsidiary sons, such as is compounded by Nárada and others.[4] The above, passages, however, have led [illegible]

[1] Dattaka-Chandriká, 3, 1.

[2] Dat. Chand. V, 28.

[3] *Puddokumári Devi* v. *Jagat Kishore Acharjee*, I. L. R., 5 Calc., 615.

[4] See Dat. Chand. V, 4 and 27.

modern doctrine that except as otherwise expressly provided, an adopted son does, in every respect, resemble the real legitimate son,—a doctrine, which, considered from one point of view, appears to be perfectly consistent with the principles of equity and justice.

**The modern law of adopted son's right of inheritance.**—The result of the decisions of our Courts of justice is, that as regards inheritance an adopted son holds the same position as a real legitimate son, unless his right in any respect has been expressly curtailed. The distinction based upon possession or otherwise of good qualities, has been ignored, or it is implied that every adopted son must be taken to be endowed with good qualities. Let us see how the law has developed in favour of the adopted son by referring to the cases.

In the case[1] of *Gourbullub* v. *Juggernathpersaud Mitter*, the majority of the fifty-one Pundits attached to different Courts, answered the following question referred to them in the affirmative, namely, whether according to the Bengal School an adopted son could inherit from his grandfather by adoption. They were of opinion that the Dáyabhága being in conflict with Manu could not be followed. In fact they relied upon Kulluka's gloss maintaining the adopted son's right of inheriting from the members of the adopter's gotra.

In the case of *Gunga Mya* v. *Kishen Kishore*[2] the Sudder Court held that an adopted son does not succeed to the relatives of the adoptive mother; and this rule is adopted in Macnaghten's Hindu Law.[3]

In the case of *Sumboochunder Chowdry* v. *Naraini Debeh*,[4] the Judicial Committee observed,—"Now these are very strong authorities in favour of the proposition, that an adopted son is entitled to succeed lineally and collaterally; and the reason pointed out, according to the Hindu law, is, that he becomes for all purposes the son of the father." And their Lordships accordingly held that the adopted son of the brother of the whole blood was entitled to inherit in preference to the son of a brother of the half blood.

The Bengal Sudder Court held in several cases that an adopted son is entitled to inherit from his paternal uncle by adoption.[5] And an adopted son's son was held entitled to the rights of his father.[6]

In the case[7] of *Gunga Prasad Roy* v. *Brijessuree Chowdhrani*, the Sudder

[1] Sir F. Macnaghten's considerations on H. L., 159.

[2] 3 Beng. Sel. Reps., 170.

[3] Page 78.

[4] 3 Knapp's Reports, 55; 5 W. R., P. C., 100.

[5] *Lukhee Nath Roy* v. *Shamasoondures*, Beng. S. D. A. D., 1858, p. 1863; *Kishen Nauth Roy* v. *Huree Govind Roy*, *Idem.*, 1859, p. 18; *Gooroo Pershad Bose* v. *Rashbehary Bose*, *Idem.*, 1860, Vol. I, 411.

[6] *Idem*, 1858, 1863; *Idem*, 1859, 18.

[7] Beng. S. D. A. D., 1859, p. 1091.

Court held that the relatives of an adoptive mother inherit the property of her adopted son, just as they would have succeeded to her natural born son.

But in the case[1] of *Morun Moyee Debi* v. *Bejoy Krishto Gossamee*, it was held by the High Court that an adopted son cannot succeed to his adoptive maternal grandfather's estate. The reason assigned is, that there is no direct text of Hindu law distinctly recognizing the adopted son's right of inheriting from his adoptive mother's relations.

In the case[2] of *Teencowree Chatterjee* v. *Denonath Banerjee*, it was held that an adopted son has all the rights and privileges of a son born, and is also entitled to succeed to the *stridhanam* of his adoptive mother in the absence of daughters, in like manner as a son born. This ruling has settled a point upon which the Hindu commentators on adoption are entirely silent. In dealing with the order of succession to a woman's property amongst her descendants both the Mitákshará and the Dáyabhága, however, appear to contemplate the issue of her body. The Court in the above case have further expressed an opinion that a son adopted by one wife may succeed to a co-wife's *stridhanam*; but the provision of the Hindu law referred to, applies to the husband's natural son by a contemporary wife.

In the case of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*,[3] it was held following the ruling of the Privy Council in *Shumboo Chunder's* case that an adopted son is entitled to succeed to the first cousin of his grandfather by adoption.

Distinguishing *Morun Moyee's* case as having special reference to the Dáyabhága law, a Full Bench of the Allahabad High Court held[4] that under the Dattaka-Mímánsa and the Mitákshará, an adopted son succeeds to property which his adoptive mother inherited from her father as his heiress. The Court in coming to that conclusion relied upon the doctrine of spiritual benefit conferred by the adopted son on his adoptive mother's father. It has, however, been held in subsequent cases that the general law of inheritance according to the Mitákshará is not based upon that doctrine.

In the case[5] of *Puddo Kumaree Debee* v. *Jugut Kishore Acharjee*, the Calcutta High Court, following the decision of the Privy Council in *Sumbhoo Chunder's* case, ruled that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son; and accordingly held that an adopted son is entitled to succeed to his adoptive father's daughter's son, in preference to the grandnephew of his adoptive father. One of the

[1] W. R. Sp. No., F. B., 121. Followed in *Chinna Ramakristna Ayyar* v. *Minatchi*, 7 Mad. H. C. R., 245.

[2] 3 W. R., 49.

[3] *Sham Kuar* v. *Gaya Din*, I. L. R., 1 All. 255.

[4] 9 W. R., 423.

[5] I. L. R., 5 Calc., 615.

reasons assigned is, that the adopted son succeeds to the *sapinda* kinsmen of his father, and that as regards the relation of *sapinda*, there is no difference between the adopted and the natural born son. In laying down the last proposition the Court relied on the exposition of *sapinda*-relationship, given in *Guru Gobind Shaha Mundal's* case.[1] The contention that an adopted son's right of inheritance is confined within the *gotra* of the adoptive father has been overruled by this decision, and it has been affirmed on appeal by the Privy Council.[2]

In *Uma Sunkur Moitro* v. *Kali Komul Mozumdar*,[3] a Full Bench of the Calcutta High Court ruled that an adopted son is entitled to inherit from his adoptive mother's relations in the same way as a son of her body; and this ruling has been affirmed on appeal by the Judicial Committee.[4]

In all these cases the adopted son was declared entitled to inherit from the relations by adoption who were all within the degree of *sapinda*, and in the last case the High Court based their decision upon the ground that the adopted son was sapinda to his adoptive mother's father's brother, and as such entitled to be his heir. The Dattaka-Chandriká, again, which is considered to be most authoritative in Bengal, recognizes the adopted son's right to inherit from the sapindas only. It was upon these grounds contended in a subsequent case[5] that the adopted son is not entitled to inherit from a relation of his adoptive father's family, who is beyond the degree of sapinda. This contention was overruled by the High Court with the following observation,—"Unless, therefore, we found some authority clearly restricting the rights of inheritance, on the part of an adopted son, and declaring that they are something less than those of the naturally begotten son, we certainly should make no distinction between them."

The law is therefore now settled beyond the possibility of further controversy that as regards inheritance from adoptive parents and their relations an adopted son holds precisely the same position as a real legitimate son of his adoptive parents, excepting in one particular to which I shall presently refer.

One consequence of the above principle has been the improvement of the daughter's position in the Bengal School with respect to her right of inheriting from her father. For, according to the Dáyabhága[6], a daughter who is a widow, or is barren, or fails in bringing forth male issue as bearing none but daughters or from some other cause, is excluded from the inheritance of her father. This

[1] 5 B. L. R. 15; 13 W. R., 49, F. B.

[2] *Padmakumari Debi Chowdhrani* v. *Court of Wards*, I. L. R., 8 Calc., 302; L. R., 8 I. A., 229.

[3] I. L. R., 6 Calc., 265: 7 C. L. R., 145.

[4] *Kali Komul Mozumdar* v. *Uma Sunkur Moitra*, I. L. R. 10 Calc, 232; 13 C. L. R., 379; L. R., 10 I. A., 138

[5] *Mokundo Lall Roy* v. *Bykunt Nath Roy*, I. L. R., 6 Calc., 289.

[6] Ch. XI, Sect. II, para. 3.

rule was relied on in *Morun Moyee's* case as an argument against the adopted son's right of succession to the adoptive mother's father and others. But according to the law as it now stands, a daughter who is capable of having an adopted son cannot be excluded, although she may be disqualified in the manner set forth in the Dáyabhága.

**The adopted son's share.**—The only express provision of law curtailing an adopted son's right is that relating to the share he is entitled to have out of the adopter's property when there is also a begotten son: the adopted son is entitled to a lesser share than the real legitimate son. There is a difference between the authorities as to the amount of the adopted son's share: according to some[1] he is entitled to a quarter share; and to a third, agreeably to others.[2] The expressions quarter and third share do not appear to be used with reference to the estate, that is, the adopted son is not entitled to one fourth or one third of the estate, for if that were so, he would be in a better position than a real legitimate son if there be three or more such sons. But the expressions are capable of different constructions, and have been variously interpreted. In Bengal, an adopted son is considered to be entitled to a third share of the whole property, assuming that there is only one begotten son; thus you get the proportion of the shares of the adopted and the begotten son, that is to say, an adopted son is to get half of what is to be allotted to each begotten son.[3] In other provinces, an adopted son is entitled to a fourth share, which has been interpreted in the above manner to mean that an adopted son takes one third of what is allotted to a begotten son. This interpretation of the fourth and the third share, though most favourable to an adopted son, does not, however, appear to be supported by Hindu law, but is mainly due to the expressions "a fourth *part*" and "a third *part*" used in the English versions of some texts,[4] from which it may be inferred that an adopted son is entitled to a third or fourth part of the estate. The original word is *bhága* which means the same thing as *ansa*, or share. Thus the text of Vasishtha laying down that if a real legitimate son be subsequently born, the Dattaka son is entitled to a fourth (*bhága*) *part*[5] is explained[6] by Nanda Pandita to mean that the given son receives a quarter *share*, not an entire *share*. Sutherland has also rendered the word *ansa* into *part*;[7] so it is not always safe to place much reliance upon particular words used in the English versions of Sanskrit works on law.

[1] Mitákshará 1, 11, 24 and 25; Dat. Mím. X, 1; Vyavahára-Mayúkha, p. 60, Mandlik's edition.

[2] Dáyabhága X, 9; Dat.-Chand. V, 16-17; Colebrooke's Digest?

[3] Sir F. Macnaghten's Cons. on H. L., 137; 1 W. Macn., 70; 2 W. Macn., 184.

[4] Mitákshará, 1, 11, 24-26; Dat. Mím. X, 1; Dat. Chand. V, 16-17.

[5] Dat. Mím. V, 31; X, 1.

[6] Dat. Mím. V, 40.

[7] Dat. Chand. V, 16.

But the Madras High Court have held[1] upon the authority of the Saraswatí-Vilása, that an adopted son takes one fourth of the real legitimate son's share, that is to say, each begotten son is to be considered equal to four adopted sons. Expressions like quarter share, may be construed in another way; according to the Mitákshará,[2] a maiden daughter is declared to be entitled to a quarter share on partition of her father's estate being made by her brothers; and the quarter share is ascertained in this way,[3]—divide the property into as many shares as there are brother's and maiden sisters, divide one such share into four parts, allot one such part to each of the maiden sisters, and then distribute the residue amongst the brothers equally. Nanda Pandita appears to indicate that the quarter share of an adopted son is to be similarly determined.[4]

This unequal distribution of the adoptive father's estate between the adopted and the real legitimate son is based upon the relative superiority and inferiority of their status. It is expressly stated by the lawgivers as well as by the commentators, that the son of the body is superior to the subsidiary sons, and he gets a larger share in consequence of his preferable claim due to superior rank. When a son by adoption gets a smaller share than a real son out of the adoptive father's estate, upon the ground of his inferiority to the latter; the distinction must *a fortiori* apply when an adopted son and a real relation are competitors for the inheritance of any other relation. This view is maintained in the Dattaka-Chandriká. The author of this treatise after having laid down that an adopted son if endued with good qualities, is entitled to a third share out of the adopter's property when there is a son of the body, and is also entitled to inherit from the *sapindas*, observes as follows[5]:—

"Hence, it should be noticed, that by the very same relationship of brother and so forth, in virtue of which one who is the real legitimate son, would succeed to the estate of a brother and the like, a similar relation by adoption, also, obtains his *proper* share according to the circumstances.

"Similarly, if another son of the (deceased) proprietor exists, a grandson

[1] *Ayyávu Muppandr* v. *Niládatchi Ammál*, 1 Mad H. C. R., 45. [2] 1, 7, 5-13.

[3] Mitákshará 1, 7, 7-8; Víramitrodaya, p. 82. [4] Dat. Mím. V, 40.

[5] The original is as follows:—एवंगोरस्य भ्रात्रादिधर्मे येनैव भ्रात्रादिना सम्बन्धेनाधिकारित्वं तादृशेनैव सम्बन्धेन तादृशदत्तकस्यापि यथासम्भवसुचितांशभागित्वमवधेयं।

एवं धनिनः पुत्रान्तरसत्त्वे स्वसपिण्डस्य दत्तकपौत्रस्यापि दत्तोचितांशभागित्वं तदसत्त्वे सर्व्वहरत्वमपीति।

न च पौत्रस्य स्वपिण्ड-योग्यांशभागित्वनियमात् दत्तस्य यद्दौतुः पितामहौरसत्वे तादृशपिण्डयतुल्यत्वेनांशस्य तद्-योग्यत्वाद्-दत्तकपौत्रः पिण्डयतुल्यमेवांशं लभतामिति वाच्यं।

पुत्रस्य दत्तके चतुर्थांशः, पौत्रस्य तु तथात्वे समानांश इति वैषम्यात्।

ततश्च स्वसमानरूपस्य पितुर्यादृशांशः शास्त्रसिद्धः, तस्यैव स्वपिण्डयोग्यांशवेति यथोक्तमेव साधु।

एवं रीतिः प्रपौत्रेऽप्यनुसन्धेयेति।

by adoption, also, whose father is dead, obtains the share *proper* for an adopted son; if no son exists, obtains even the whole estate.

"Nor can it be contended that the rule is, that a grandson is entitled to the share which is appropriate for his own father, therefore when the adoptive father of the Dáttaka (grandson) was the real legitimate son of his paternal grandfather by adoption, the share appropriate for his adoptive father must be equal to that of the paternal uncle of the same description (with his adoptive father who was a real legitimate son); hence let the grandson by adoption take an equal share even with the paternal uncle.

"For, then there would be this unreasonable distinction, namely, that a son by adoption would take a quarter share, but a grandson by adoption would receive an equal share.

"Hence what has already been said is correct, namely, that such share alone which is legally established for a father of the same description as himself, is the share which is appropriate for his own father, (though the latter was the real legitimate son.)

"The same rule is to be followed also in the case of a great-grandson (by adoption.)"

There cannot be any doubt that, according to the Dattaka-Chandriká, when a relation by adoption is entitled to inherit together with a real relation of the same degree, either lineally or collaterally, the former must take half as much as is taken by the latter; in fact, the rule which has been laid down with respect to the distribution of the adopter's estate between an adopted and a real son, is to be applied to all cases. Accordingly it was held upon the opinion of a Pandit in a case in which succession opened to the nephews, that a nephew by adoption was entitled to half of what was to be allotted to each of the real nephews.[1]

Mr. Sutherland, however, omitted to translate a few lines of the above passage of the Dattaka-Chandriká and misunderstood and mistranslated the rest,[2] so that the real meaning of it has been obscured. And accordingly the Calcutta High Court were of opinion that the passage related to the adopted son of an adopted son, and held that when an adopted son comes to share with heirs other than the real legitimate son of his adoptive father, in the property of a collateral kinsman, he takes the same share that they would have.[3] The Court had not before it the omitted passage in which a relation by adoption is declared to take his *proper* share when succeeding to a collateral relation such as a brother by adoption.

[1] 2 W. Macnaghten, 69.

[2] Dat.-Chand. V, 24-25.

[3] *Tara Mohan Bhuttacharjee* v. *Kripa Moyee Debia*, 9 W. R., 423.

In a later case,[1] the omitted lines were translated, and incorporated with Mr. Sutherland's translation of the remainder of the passage. That was a case governed by the Mitákshará, and the facts of it were as follows: a person had three sons one of whom adopted the plaintiff and subsequently died during the lifetime of his father, who died afterwards; the property was not acquired by that person himself but was inherited by him from his ancestor, consequently the predeceased son had acquired a right to the same from his birth, and his adopted son, the plaintiff claimed a one third share of the whole family property as against the sons of his two paternal uncles by adoption, who contended before the High Court that the plaintiff was not entitled to one third but to one sixth of the estate, that is, his share should be half of what would be allotted to a real legitimate son. It was held that on partition in a Mitákshará joint family an adopted son and the adopted son of a natural born son stand exactly in the same position, and each takes only the share proper for an adopted son, *i. e.*, half of the share allotted to a real legitimate son; and the fact that an adopted son of a member of a Mitákshará joint family becomes from the moment of his adoption a joint owner of the family property will not prevent the operation of the rule: the plaintiff was held entitled to one sixth.

The Madras High Court, however, have expressed a doubt[2] whether the passage of the Dattaka-Chandriká, even with the addition, has been correctly interpreted in the above case; and Mr. Mayne[3] also has criticised it, and given his own interpretation of the passage erroneously translated by Sutherland. Mr. Mayne of course argues with the usual partiality of the modern law, of which the adopted son is a special favourite, and which abhors to raise any presumption against him, or to perceive a general principle underlying the rule of unequal distribution of a father's estate between his adopted and begotten sons. He fails to see that the distinction rests, according to the lawgivers and the commentators, upon inferiority and superiority of their status which must admittedly be taken relatively to the adoptive father, and therefore also relatively to all the adopter's relations; for, it is by reason of the filial relation to the adoptive father that an adopted son becomes connected with the adoptive father's relations; hence a distinction between the character of the filial relation of an adopted and of a begotten son, to the father, amounts to a distinction between a relation by adoption and a real relation.

The passage of the Dattaka-Chandriká, however, if rightly understood does not directly support the decision of the Calcutta High Court. For it contemplates only cases of succession by inheritance, and not cases of acquisition of right by birth or survivorship, recognized by the Mitákshará but not by the

[1] *Raghubanand Dass* v. *Sadhu Churn Dass*, I. L. R., 4 Calc., 425.

[2] *Rájá* v. *Subbaraya*, I. L. R., 7 Mad., 353. [3] Mayne's H. L. § 157.

Dáyabhága. The author appears to be a lawyer of the Bengal School, and what he says is that if a *proprietor*[1] dies leaving a son and a predeceased son's adopted son, as his heirs, then the latter would take an adopted son's share only. The general rule is, that right of representation obtains amongst descendants in the male line, and partition is made *per stirpes* and not *per capita*. But the author says that the grandson by adoption cannot represent his adoptive father fully so as to inherit the same share which his father if alive would have inherited, but must take only an adopted son's share. The author's observations do not apply to a case like the one before the High Court, in which the adoptive father had a vested interest in the family estate, and his undivided coparcenary interest must on his death have passed entirely to the adopted son, who had also acquired a right to the same from the moment of his adoption which is equivalent to birth; hence, under the facts of the case, he was entitled to such an undivided interest in the family estate as would be equal to one-fourth of it if partition had taken place during the life of his adoptive father; and supposing that the undivided one-fourth share of the grandfather by adoption should be divided in the same way as his separate property, the grandson by adoption would be entitled to a one-fifth share of it, that is to say, his undivided share would be $(\frac{1}{4}+\frac{1}{20})$ of the family estate. It is undoubtedly true that the question of shares does not arise until partition is actually made, but still the share to which any one of the members of a joint family would be entitled may be ascertained without difficulty. The High Court, however, do not seem to be correct in declaring that the grandson by adoption would be entitled to one-sixth, for it appears that, according to the Bengal view, he should take one-fifth of the estate under the circumstances of the case.

In a recent case[2] it has been held that the adopted son of one daughter shares equally with the real legitimate son of another daughter the inheritance left by the maternal grandfather, because there is no *special* text or rule laid down in the books applicable to this case; in other words, the Court refused to apply to daughter's sons, the rule laid down in the Dattaka-Chandriká with respect to descendants in the male line.

There is, however, a passage of Vriddha Gautama declaring that an adopted son, abounding in good qualities takes an equal share of the father's estate with an after-born son. The Dattaka-Mímánsá reconciles[3] this text with those of Vasishtha[4] and Baudháyana[5] declaring that an adopted son is entitled to a quarter share when a son is subsequently born, by saying that it applies wh the

[1] Sutherland has used the word *ancestor* which obscures the meaning.

[2] *Surjokant Nundi* v. *Mohesh Chunder Dutt*, I. L. R., 9 Calc., 70.

[3] Dat. Mím. V, 43-44. [4] Dat. Mím. V, 31. [5] Dat. Mím. V

after-born son is destitute of good qualities. But the Dattaka-Chandriká maintains[1] that amongst Sudras an adopted son shares equally with an after-born son, and explains[2] the text of Vriddha Gautama to be applicable to that caste. Accordingly it is held by the Madras High Court that amongst Sudras an adopted son is entitled to take an equal share with a son born after adoption.[3] And the same view has been taken by the Calcutta High Court in an unreported case.[4] It should be observed that this rule is laid down only in the Dattaka-Chandriká and is not supported by any clear authority of law. The existence of this rule seems to have been unknown to Sir F. Macnaghten, for in his notice of the case of *Gopee Mohun Deb* v. *Raja Rajkrishna*, in which the parties were Káyasthas who are high caste Sudras, he was of opinion that the adopted son was entitled to the one-third of the adoptive father's estate, and the after-born son to the remainder.[5] Mr. W. Macnaghten thinks that the rule obtains in southern provinces.[6] Babu Shama Churn Sarkar contends[7] that the above rule is not applicable to the virtuous Sudras of this country whose practices are similar to those of the regenerate classes.

When an only son becomes by adoption the Dvyámushyáyana son of two fathers, he is entitled to take the whole estate of both the fathers; but if another son is born to his natural father then he would take half of what the after-born son takes; and if a son is born to the adoptive father, then he would take only half of an adopted son's share, that is, half of one-third or one-fourth.[8]

**Adopted son's rights as against the adopter, and in the joint family.**—According to the Mitákshará School, an adopted son acquires a right equal to that of the adoptive father, in the ancestral immoveable property and in the accretions to the same, from the moment of his adoption in the same way as a real legitimate son does from his birth; he becomes a coparcener of the adoptive father who cannot dispose of such property without the son's consent.[9] An adopted son being thus a joint owner of the family property, would, like a real legitimate son, be entitled to take, by survivorship the undivided coparcenary interest of a member dying without male issue to the exclusion of the heirs to

[1] Dat. Chand. V, 29-31.

[2] *Idem.* V, 32.

[3] *Rájá* v. *Subbaraya*, I. L. R., 7 Mad., 253.

[4] A. O. D. No. 148 of 1832 *Bramanund Mahunty* v. *Chowdhry Krishnachurn Patnaik.*

[5] Cons. on H. L., 233.

[6] 1 W. Macn. 70, note; 1 Strange's H. L., 99.

[7] Vyavastha-Darpana, pp. 913-915.

[8] Dattaka-Chandrika, V, 33.

[9] *Rungama* v. *Atchama*, 4 Moore's I. A., 1; *Sudanund Mohapattur* v. *Soorjo Monee Doyee*, 8 W. R., 455; 11 W. R., 436.

his separate property. Accordingly it has been held that when a man died leaving an adopted son and an after-born son, who were the surviving members of the joint family, and subsequently the real legitimate son died, the adopted son was entitled to take the whole estate.[1] Hence according to the Mitákshará School, when there is ancestral property the adopted son acquires as against even the adoptive father a present indefeasible interest in such property, which renders his position secure.

But what are the rights of an adopted son against the adoptive father in the Bengal School according to which there is no distinction between ancestral and self-acquired property, and the father is competent to dispose of them according to his pleasure without any restriction; and also in the Mitákshará School when the adopter's property is his self-acquired and he can alienate the same without restraint? If he be in no better position than a real legitimate son, he must in that case be left completely at the mercy of the adopter who may disinherit him of such property. The doctrine that an adopted son holds in every respect the same position as a real legitimate son, which has been enunciated by the Courts for the purpose of giving him the contingent right of succession to kinsmen's estate, fails to afford the real protection needed by an adopted son, *viz.*, the protection against the displeasure of the adoptive father, which is specially required in Bengal; for, a Mitákshará father may be presumed to possess some ancestral property, and the interest acquired in it by an adopted son may be taken to be a sufficient provision for him.

There are, however, some cases governed by the Mitákshará, in which it has been held that an adoptive father is competent to make a gift either by an act *inter vivos*[2] or by a will,[3] of his self-acquired immoveable property, so as to deprive the adopted son of the right of inheriting such property or any part thereof; and the reason assigned is, that an adopted son does not stand in a better position, with respect to such property, than a real legitimate son. In these cases, the adopted sons became entitled to very large ancestral estates, and consequently the result did not appear to be inequitable at all.

But if the same rule be followed in Bengal where there is no distinction between the ancestral and self-acquired property as regards the father's power of disposal, the adopted son would have no rights against the adoptive father as regards his property. It would be most inequitable if in Bengal an adopted son should not be in a better position than a real legitimate son, with regard to the property of the adoptive father; for the safeguard of natural love and affec-

[1] See note to *Ayyávu Muppanár* v. *Níládatchi Ammál*, 1 Mad. H. C. R., 45 (49).

[2] *Rungama* v. *Atchama*, 4 Moore's I. A., 1: 7 W. R., P. C., 57.

[3] *Purshotam Shámá Shenvi* v. *Vásudev Krishna Shenvi*, 8 Bom. H. C. R., O. C., 6: *Sudanund Mohaputtur* v. *Bonomalee Dass*, Marshall, 137; 2 Hay, 205.

tion protecting a natural born son's interest is wanting in the case of an adopted son. But it seems that the law of adoption does protect an adopted son against a whimsical and capricious adoptive father by curtailing his unlimited power of disposing his property after adoption. For an adoption consisting in the gift and acceptance of a son for affiliation is a solemn contract creating obligations binding the adopter. The natural father gives his son in adoption upon the express understanding that the adopter will invest the child with the status of his son, and the adopter by accepting the boy on that condition undertakes to invest him with the rights of his son. Now the status of a son is constituted by the right to offer funeral oblations to the adopter and the right of taking his estate.[1] Thus, there is an implied if not express contract by the adopter that his property will be inherited by the adopted son. In fact he appoints the adopted son as his heir; he cannot, therefore, be permitted by law to resile from his contract of adoption, and to alienate by an act *inter vivos* his property with the object of depriving the adopted son, far less to disinherit him by a will. After having legally appointed an heir to his entire property he appears to be incompetent to make a testamentary disposition of his property so as to defeat the adopted son's right of inheritance from him, when by his adoption the child has been deprived of all his rights in his natural family. In those cases in which deeds of gift and acceptance are exchanged between the adopter and the natural father, the deed of acceptance executed by the former in favour of the latter generally embodies an express agreement by which he promises that the adopted son will get the whole of his property.

Referring to the case of *Gopeemohun Deb* v. *Raja Rajkrishna*, in which Raja Nabokissen had executed an agreement of the above description when adopting *Gopeemohun*, and subsequently after the birth of his son *Rajkrishna* executed a will whereby he gave a larger share to his begotten son than he could get on a lawful distribution, and which was settled out of Court,—Sir F. Macnaghten observes,[2]—"There was not a formal decision but the opinion of the Court was well-known to be, indeed it was declared to be, that a man who had adopted a son, was not at liberty, by his will, to cut off the adopted son from that proportion of the estate, to which, in virtue of his adoption, he was entitled by the Hindoo law." The learned author is of opinion "that the boy who is taken for adoption ought to be considered as a *purchaser*."[3]

**Ante-adoption arrangement curtailing adopted son's interest.**—Whatever restraint, law and equity may impose upon an adoptive father's power of dealing with his property after adoption, there cannot be any valid objection against any arrangement made by him of his property in contemplation of adoption, whereby the interest of the adopted son may be diminished. For instance,

[1] Dat. Mim. 2, 62. [2] Considerations on H. L., p. 228. [3] Considerations on H. L., p. 230.

if a man authorizing his widow to adopt a son, directs that she shall enjoy his estate for her life subject to the maintenance of the son to be adopted, who shall be entitled to the estate only after her death, the disposition would be perfectly unexceptionable,[1] specially when the natural father gives his son in adoption with the knowledge of the same. The adopted son cannot impugn the arrangement any more than a sale or similar transfer of any property made by the adoptive father before adoption. And this rule appears applicable in both the schools, for a Mitákshará father also, before the birth or adoption of a son, is absolute master of even the ancestral immoveable property so as to be legally competent to alienate it in any way he pleases: a conveyance by a person, without male issue at the date thereof, will bind his subsequently born or adopted son; such issue at birth or adoption takes a vested interest only in such property as belongs to their father at that time.[2] But it is said that in the provinces governed by the Mitákshará School, where a son acquires a vested interest by birth, a gift of life-interest to the widow or any other condition diminishing the interest which the adopted son would otherwise take, would be invalid except when the property affected is self-acquired.[3] It is difficult to understand how an adopted son can call into question the terms and conditions coupled with the authority which brings him into existence, for it would be, in fact, affirming and disaffirming the same transaction.

In a recent case before the Madras High Court, in which a Hindu, on taking a son in adoption had executed a "settlement as to what should be done by my adopted son and my wife after my lifetime," providing that on an event which happened, the wife should enjoy certain land for life in lieu of maintenance, and the widow of the executant claimed possession of the land against the adopted son,—it has been held that the instrument was a will, and the adopted son was bound by its provisions, but the reason assigned is, that the natural father of the defendant when giving him in adoption had tacitly consented to the arrangement contained in it.[4]

Similarly, where a widow in whom her husband's estate had vested by inheritance consented to accept a boy in adoption on an express agreement by his natural father that during her lifetime she should enjoy such property, subject, however, to the boy's maintenance and education, and upon the faith of such agreement adopted the boy, it appearing that she would not have done so at all had there been no such agreement; it was held by the Bombay High Court that the agreement was binding upon the adopted son, and that the adopted son's inheritance of the father's estate was subject to the life-interest, the enjoy

[1] *Bepin Behary Bandopadhya* v. *Brojonath Mukhopadhya*, I. L. R., 8 Calc., 357.

[2] *Rambhat* v. *Lakshman Chintáman Maydlay*, I. L. R., 5 Bom., 630.

[3] Mayne's Hindu Law § 180; *Narainah* v. *Savoobhady*, Mad. S. D. A. D. R., of 1854.

[4] *Lakshmi* v. *Subramanya*, I. L. R., 12 Mad., 490.

reserved by the adoptive mother.[1] This case is referred to by the Privy Council in a later Madras[2] case in which there was a similar agreement which was ratified by the adopted son after attaining majority; but the Judicial Committee, without deciding whether the agreement was binding, declared that it was not absolutely void, but capable of ratification by the adopted son. In a subsequent case the Madras High Court expressed the opinion, that an adopted son is not bound by the assent of his natural father to terms imposed as a condition of the adoption, and that it would lie with the minor, when he came of age, to assent to or repudiate them;[3] but in a recent case the decision of the Bombay High Court has been followed.[4]

The Bombay High Court's ruling is based upon two considerations; first, that on the whole the contract of adoption was not unfavourable to the minor; second, that the father had such power over his child, as to bind him by the agreement. With respect to the father's power it is observed,—"Besides, it is a fallacy to suppose that, for the purpose of giving in adoption, the power of a father is only co-extensive with the power of a guardian. In the eye of Hindu law, when a man gives his son in adoption, he would seem to exercise a power, more like the powers of an absolute proprietor than that of a guardian." But the Madras High Court are of opinion that the consent of the natural father to such arrangements binds the adopted son, not only on the principle on which infants are bound by other agreements made on their behalf, *viz.*, on the principle that the agreements are made for a necessary purpose, but also on the ground that but for such consent, the adoption would never have taken place; for, to object to the agreement is tantamount to objecting to the adoption.[4]

But there is another aspect of the question, which supports the view taken by the Bombay High Court and recently adopted by the High Court of Madras. When a widow inheriting her deceased husband's estate is authorized by him to adopt a son, her interest is opposed to her duty of adoption; she again cannot be legally compelled to adopt. Under such circumstances the only way in which effect may be given to her husband's desire, consistently with her own interest, is an arrangement of the above description. The natural father's assent to it may be taken to be conclusive evidence of the fact that the adoption, subject to the conditions, is beneficial to his child. If such arrangements be not considered binding on the adopted son, many

[1] *Chitko Raghunáth Rájádiksh* v. *Jánaki*, 11 Bom. H. C. R., 199; followed in *Rávji Vináyakrav* v. *Lakshmibai*, I. L. R., 11 Bom., 381.

[2] *Ramasawmi Aiyar* v. *Vencataramaiyan*, I. L. R., 2 Mad., 91; L. R., 6 I. A., 196; 5 C. L. R., 347.

[3] *Lakshmana Rau* v. *Lakshmi Ammal*, I. L. R., 4 Mad., 160.

[4] *Lakshmi* v. *Subramanya*, I. L. R., 12 Mad., 490 (494.)

widows would refuse to adopt. Besides, when the acceptance of the son is made subject to the terms and conditions reducing his interest in the adoptive father's estate, if the terms and conditions be held to be not binding on the son, it is difficult to understand how the acceptance would be binding on the widow. It may no doubt be said upon the analogy of the doctrines relating to powers of appointment, that the adoption would be valid and the condition void. But the analogy seems to be fallacious; for the law will not compel a widow to execute the power, she is therefore at perfect liberty to enjoy her husband's estate without executing the power; hence a conditional adoption by the widow with the reservation to herself of the life-interest or a lesser interest in her husband's estate cannot be regarded as a fraudulent execution of the power, since the benefit to herself does not result from the execution of the power in that way; on the contrary it would be a legal fraud on the widow to hold that the adoption is valid and the condition void. Besides the object which the donor had in giving the power would in no way be defeated by holding both the adoption and the condition to be valid. The spiritual purpose served by an adopted son is not in the least affected by a conditional adoption, and the recognition of its validity in its entirety would rather prevent the donor's intention from being completely defeated. You should further bear in mind what I have already told you, namely, that according to the correct view of the Hindu law a widow adopting a child with the consent signified by her deceased husband, does not in so doing act as his agent, delegate or representative, but she acts in her own right; and the discretion which she wants according to Hindu law, being only supplied by the husband's assent. In this view of the case, the question assumes quite a different aspect.

The question whether the condition derogating from the interest which would otherwise be taken by the adopted son, is binding on him, does not seem to depend only upon the capacity of the natural father to bind his son given in adoption, but also upon the question whether the conditional acceptance by the widow, can be affirmed and disaffirmed by the adopted son at the same time. It appears to be most equitable that he should be put to his election either to approbate or reprobate the adoption.

**Adoption by widow and divesting.**—When a widow adopts under a simple authority of her husband to adopt, not containing testamentary disposition of property, the son adopted by her is entitled to take the estate of the adoptive father by inheritance and not by devise.[1] But as the estate of a Hindu cannot remain in abeyance for an heir who is to come into existence in future,[2] but it vest in the nearest heir living at the time of his death, a son adopted by a

[1] *Bhoobun Moyee Debi* v. *Ram Kishore Acharji*, 10 Moore's I. A., 279; 3 W. R., P. C.

[2] See Mayne's Hindu Law § 458 and cases in its notes.

widow of a person, therefore, cannot take even the estate of that person excepting by divesting the heir who took it on the death of the adoptive father. So also, succession to the estate of other persons may open in the interval between the death of the adoptive father and the adoption by his widow, to which the adopted son would have been entitled had he been adopted before the opening of the succession. Hence the vexed question arises as to what estate already vested in other persons can a subsequently adopted son take by divesting them.

**Vesting and devesting according to the Dáyabhága and the Mitákshará School.**—There appears to be considerable difference between the two schools with respect to vesting and devesting of heritable estates owing to the difference of fundamental doctrines relating to inheritance. According to the Bengal School, right by birth is not admitted, and inheritance means the acquisition of ownership on account of relationship by one person in the property of another whose ownership therein has become extinguished by death, natural or civil. But according to the Mitákshará, inheritance is of two kinds, namely, obstructed or unobstructed, the former of which is similar to what it is in the Bengal School, but the latter is peculiar to the Mitákshará School, and recognises the right by birth, of male issue in the property of paternal ancestors during their life, joint tenancy amongst members of a joint family, and survivorship.

Accordingly, in all cases in the Bengal School, and also in the Mitákshará School in so far as the obstructed heritage is concerned, inheritance once vested in the heir existing at the time of its falling in, cannot be divested by reason of any subsequent disqualification of the heir,[1] or by reason of a nearer heir coming into existence afterwards.[2] The decision of the Full Bench in the case of *Kalidas Das*[2] should be specially studied in the present connection; in that case a Hindu died leaving a blind son and two widows, his estate devolved on the latter to the exclusion of the disqualified son, and on their death it passed to his brother's son, and subsequently a son was born to his blind son, who was free from any disqualification and claimed his grandfather's estate as against the nephew; the Full Bench held that the estate having vested before his birth in the nephew, the latter could not be divested. It should be observed that a real legitimate grandson is far superior to an adopted son, and if an estate cannot be divested in his favour, far less can it be in favour of an adopted son.

But this rule of vesting and divesting cannot apply to a Mitákshará joint family in which vesting and divesting continually go on, the property being vested in the family and not in a particular individual member who again

[1] *Moniram Kotita* v. *Kerry Kolitari*, I. L. R. 5 Cal. 776; *Deo Kishen* v. *Budh Prakash*, I. L. R., 5 All., 509.

[2] *Kalidas Das* v. *Krishna Chandra Das*, 11 W. R., O. C., 11; 2 B. L. R., F. B., 103.

acquires a right by birth to ancestral property. For, a man possessed of ancestral property is absolute master of it before a son is born to him, and may dispose of it according to his pleasure; but as soon as a son is born to him, the son acquires a co-equal interest in the property of which the father becomes partially divested, and his right of dealing with the property also becomes limited; their interest again is liable to be reduced by the subsequent birth of sons; conversely, if any one of the coparceners dies, his interest will pass by survivorship and enhance the interest of the surviving members of the family. On the same principle, if any member be subsequently affected by any legal disqualification, such as insanity,[1] his coparcenary interest will cease. Thus it is clear that vesting of joint property in a member of a joint Mitákshará family, by birth or survivorship, is distinguishable from vesting of property by inheritance which takes place on the death of the previous owner; in the former case the interest is liable to be divested by certain subsequent events, whereas in the latter case it is not so liable. Accordingly, if in the blindman's son's case, the family were a joint one governed by the Mitákshará, it appears consistent with its doctrines that he would take the interest of his grandfather.

**Widow's estate divested.**—When the widow as heiress of her husband inherits his estate and subsequently adopts a son under his authority, it is held that she divests from herself the estate which at once vests in the adopted son.[2] As against the adopting mother, the adopted son occupies the position of a posthumous son, and this result may be accounted for by the theory of constructive pregnancy of a widow with authority, put forward by Pundits,[3] and also by another doctrine propounded by them, namely, that inheritance might remain suspended for a nearer heir expected to come into existence after the opening of the succession.[4] Both these doctrines, however, are now exploded; and consistently with the present strict rule against the devesting of an estate already vested, the adopted son ought to succeed to the adoptive father's estate on the death of the widow, unless you have recourse to the fiction of posthumous birth.

**Estate inherited by adopting widow from her son.**—We have already seen that when a man dies leaving a son and giving a conditional authority to his widow to adopt in the event of that son's death, the authority cannot be exercised when the estate is vested in that son's widow;[5] but it is observed by the Privy Council that if the son died minor and unmarried, and the estate came

[1] *Ram Soonder Roy* v. *Ram Sahye Bhukut*, I. L. R., 8 Calc., 919; *Ram Shaye Bh* v. *Lalla Laljee Sahye*, I. L. R., 8 Calc., 149.

[2] *Dhurm Das Pandey* v. *Mussamut Shama Soondri Debiah*, 5 W. R., P. C., 43.

[3] *Ranee Kishenmunee* v. *Raja Oodwunt Sing*, 3 Beng. Sel. Rep, 304 (228).

[4] *Karuna Mai* v. *Jai Chandra Ghose*, 5 Beng. Sel. Rep., 50 (48).

[5] *Bhoobun Moyee Debi* v. *Ram Kishore Acharjee*, 10 Moore's I. A., 279; 3 W. R., P. C.

back to the widow, the question of adoption would stand on a different footing, as by adopting then she would divest no estate but her own. It follows from this observation that an adoption made by the widow when the estate vests in her by inheritance on the death of that son would be valid,[1] and that the son so adopted would take that estate by divesting the mother. The same opinion is expressed by the Judicial Committee in another case while upholding an adoption of that kind.[2] But in a later case[3] their Lordships observe,—"The first adopted son became his father's heir; on the death of that son after that of the father, the widow became the heir, not of her late husband but of the adopted son. Whether by the act of adopting another son, she in point of law divested herself of that estate in favour of the second son may be a question of some nicety, on which their Lordships give no opinion." This observation, therefore, cancels the effect of what was observed in the previous cases, with respect to the divesting of the adoptive mother's estate.

According to the principles of the Bengal School, the adopted son cannot lay any claim to the estate which the adoptive mother inherited from her deceased son, during her life, because the adopted son as brother by adoption is not entitled under any circumstances to take the same in preference to the mother. Accordingly the Calcutta High Court appear to have expressed the opinion that the adopted son is entitled to take the estate after the death of the adoptive mother.[4]

But according to the Mitákshará School, an adopted son may be permitted to take such estate by divesting the adoptive mother, by means of the same fiction with which she is divested of her husband's estate. For in a Mitákshará joint family a brother takes by survivorship the coparcenary interest of a brother to the exclusion of the mother, hence by assuming a fictional existence of the adopted son from the death of the adoptive father, you may suppose him a coparcener taking by survivorship as it were, to the exclusion of the adoptive mother. Whatever may be the principle, it has been held by the Bombay High Court that a Hindu widow, who adopts a son after the death of her natural born son, divests herself of her estate.[5] This view appears to be the most equitable one; for, otherwise, the adopted son would not be entitled even to maintenance, as of right, out of the estate in possession of the adoptive mother, and if he dies during her life leaving a widow and a daughter they

[1] *Ram Soonder Sing* v. *Surbanee Dassee*, 22 W. R., 121.

[2] *Vellanki Venkata* v. *Venkata Rama*, I. L. R., 1 Mad., 174 (186.)

[3] *Ramasawmy Aiyar* v. *Venkataram Aiyar*, I. L. R., 2 Mad., 91 (101.)

[4] *Bykant Monee Roy* v. *Kisto Soondaree Roy*, 7 W. R., 392; *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*, I. L. R., 5 Calo., 615, (S. C.) 4 C. L. R, 538.

[5] *Jamnabai* v. *Raychand Nahalchand*, I. L. R., 7 Bom., 225; *Rávji Vináyakráv* v. *Lakshmibai*, I. L. R., 11 Bom., 318.

would be unprovided for. As regards the adoptive mother she may reserve any interest she likes, by an ante-adoption arrangement made with the consent of the natural father.

The Allahabad High Court also have held that a widow adopting a second son after the death of the first adopted son divests herself of the estate which vests in the second adopted son.[1]

**Divesting of co-widow's estate.**—When a man dies leaving several widows who inherit his property and are competent to adopt, then the question arises whether the adoption of a son by any one of them, without consent of her co-widow would divest her interest in the husband's estate. It should be remembered that a widow is not legally bound to adopt, and that two or more co-widows are entitled to their husband's property in equal shares; hence it is difficult to understand how an adoption by one widow can divest the other of her interest. But it has been held by the Bombay High Court that even when the husband had not directed his widows to adopt, the senior widow is competent of her own accord, according to the usage obtaining in that province, to adopt a son to her deceased husband, and that since an adoption is regarded as the performance of a religious duty and a meritorious act, the younger widow is bound to give her consent, and if she refuses, the elder widow may adopt without it, and thereupon the junior widow is also divested of her interest in the husband's estate which vests in the adopted son.[2] The principle laid down in this case seems to be somewhat inconsistent with the doctrine that a widow cannot be compelled to act upon even an express direction of the husband to adopt, unless she likes. Suppose a person having a son by the younger of two widows dies, giving an authority to each of them to adopt a son in the event of the death of that son. Now on the death of that son, the estate vests in the junior widow who is unwilling to adopt, is the senior widow in whom no part of the estate is vested, competent to adopt so as to divest the younger widow? According to the above principle, probably she would be. But that would be anomalous; for, a widow is held to be incompetent to adopt when the estate is vested in another person. This rule has been applied by the Bombay High Court to an adoption by a widow without authority, which may take place in that province; and accordingly it has been held that when a man died leaving a son and a widow, and subsequently the son died leaving his widow, the mother-in-law could not adopt, as the estate being vested in the son's widow[3] was not liable to be divested.

[1] *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[2] *Rakhmábái* v. *Rádhábái*, 5 Bom. H. C. R., A. C. J., 181 (192); *Rúpchand Hira* v. *Rakhmábái*, 8 Bom. H. C. R., A. C. J., 114.

[3] *Keshav Ramkrishna* v. *Govind Ganesh*, I. L. R., 9 Bom., 94.

In Bombay an adoption seems to be regarded to be an act of very great religious merit, as widows there are permitted to adopt without the consent of either the husband or his kinsmen, and the above view may be consistent with the religious importance of the act.

But in Bengal where the doctrines are different, it would seem that the same view cannot be taken consistently with them. It is only a religious duty on the part of the widows to adopt a son agreeably to their husband's desire; and if one of them chooses to adopt a son without the consent of the other, the son becomes filially related to the adopting widow only, it would therefore be inequitable if the interest of the other widow be divested, for she would occupy the position of a stepmother to the son adopted by her co-widow. Such devesting again would militate with the Bengal doctrine that a vested inheritance cannot be divested by even the subsequent unchastity of the widow. Co-widows, according to the Bengal School, take their husband's estate in severalty as tenants-in-common and not as joint-tenants, in which character they take under the Mitákshará law, and which may lend some support to the view taken by the Bombay High Court. Besides, there is no injustice done to the adopted son by postponing his possession of the share of the other widow until her death, he being entitled to the present possession of the share of the adopting widow who divests herself of the same by her own act. But following the decision of the Bombay High Court, it has been held by the Bengal High Court that by an adoption made by one of two co-widows, both are divested of their husband's estate.[1]

**No other heir is divested.**—Excepting the adopting widow or her co-widow no other heir can be divested by an adoption made by a widow in Bengal. For, in this school the widow inherits in preference to the collaterals, and the male descendants are the only heirs who take in preference to the widow. An adoption can take place when there is no male descendant, but if a son or other male issue die leaving heirs other than the widow of the ancestor giving authority, in that case it has been held that the power is incapable of execution.[2] It appears also to follow that if the estate goes in the ascending line to an heir other than the widow of the ancestor giving authority, no adoption can take place. For instance, when a person having a son gave authority to his widows to adopt in case that son died, and on the death of that son the estate vested in his paternal grandmother, it has been held that the step-mother of the son could not adopt.[3]

As regards collateral succession opening before adoption, it has been held that an adoption cannot relate back to the death of the adoptive father so as

[1] *Mondakini Dasi v. Adinath Dey*, I. L. R., 18 Cal., 69.

[2] *Bhoobun Moyee Debi* v. *Ram Kissore Acharjee*, 10 Moore's I. A.,¶

[3] *Dromomoyee Chowdhrain* v. *Shama Churn Chowdhry*, I. L. R., 12 Calc., 246.

to entitle the adopted son to claim the estate of a collateral relation, succession to which opened before his adoption. Thus in a case[1] in which an adopted son claimed the estate of his adoptive father's paternal uncle, succession to which had on the death of his widow opened long before his adoption, it was held that he was not entitled to the property. On the same principle it has been held that even when the adoption was delayed by the fraud of the person in whom the succession vested, the adopted son was not entitled to take by inheritance any part of the estate of his uncle by adoption, succession to which had opened before his adoption and vested in a nephew.[2] On appeal, the Judicial Committee affirmed the decision and held[3] that an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral. The question of fraud was disposed of on the ground that as the succession had opened before the birth of the adopted son, it was impossible for him under any circumstances to have become an heir to the person whose estate he claimed.

In a case[4] in which a man died leaving a widow and a son by another wife, in whom his estate vested and on whose death it passed to the natural father of the boy adopted by the widow, it was held by the Madras High Court following *Bhoobunmoyi's* case that the adoption was bad in law, because the inheritance being vested in a person other than the adopting widow, it could not be defeated and divested by the adoption.

Similarly, when of two undivided brothers one died leaving only a widow, and subsequently the other brother in whom the entire estate vested by survivorship died leaving only a widow who as heiress of her husband inherited the whole estate, and afterwards the widow of the first deceased brother adopted a son with the consent of the other widow, the Bombay High Court expressed[5] an opinion, that the adoption would have been invalid, but for the consent of the widow of the other brother, because an adoption cannot have the effect of divesting an interest already vested in another person without his consent to such adoption. It has similarly been held that in the absence of express authority from her husband, the widow of a deceased member of a joint family cannot adopt without the consent of the surviving members of the family whose interest would be affected by the adoption.

**Except when widow of a member of a Mitákshará joint family adopts under his express authority**—The rule that an estate once vested by inheritance cannot be divested, is disturbed by the anomaly of an ado[illegible]on

[1] *Kally Prosonno Ghose* v. *Gocool Chunder Mitter*, I. L. R., 2 Calc., 295.
[2] *Nilkomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R., 7 Calc., 178.
[3] *Bhubaneswari Debi* v. *Nilmcomul Lahiri*, I. L. R., 12 Calc., 18.
[4] *Annammah* v. *Mabhu Bali Reddy*, 8 Mad. H. C. R., 108.
[5] *Rupchand Hindumal* v. *Rakhmábái*, 8 Bom. H. C. R., A. C. J., 114.

by the widow of a member of a Mitákshará joint family under an express permission of her husband. I have already told you that such adoption is not recognized by the Mitákshará law according to which such a widow is dependent on the surviving members of the family, and is permitted to adopt only with their consent, the theory of an adoption by a Hindu female being that she adopts in her own right but requires the consent of her guardian for the time being. An adoption under a deceased husband's permission, again is opposed to the settled principle of the Mitákshará law that a member of a joint family cannot make a testamentary disposition of undivided co-parcenary interest which, on the very moment of his death passes by survivorship, so that there is nothing left upon which his will can operate; for, a power of adoption is, so far as the donor's estate is concerned, a power of appointing an heir after his death, and it is difficult to understand as to how it can operate upon his undivided co-parcenary interest when a will cannot.

The validity of such power of adoption has all along been recognised, and consequently an adoption by a widow must necessarily divest the undivided co-parcenary interest of the husband, from the collateral relations taking it by survivorship. Accordingly in a case[1] in which an impartible zemindari passed, on the death of the holder of it who left only a widow authorized by him to adopt, to his undivided brother by survivorship to the exclusion of the widow who subsequently adopted a son, it was held by the Privy Council that the adopted son was entitled to the zemindari by divesting the brother of his adoptive father. This decision is to some extent inconsistent with the principle laid down by the Judicial Committee in the Unchastity case and in *Bhoobun Moyee's* case, and it would have been better had it been ruled that such power would be good only when the husband was separate. But it may be distinguished from those cases upon the ground that vesting and divesting in joint families governed by the Mitákshará are not of the same character as they are under the Bengal School, or even under the Mitákshará School with respect to the inheritance of separate property.

**Conclusion with respect to divesting by adoption.**—The conclusion, to which we come upon an examination of the above cases, is, that an estate vested by inheritance in other persons cannot be divested in favor of a son adopted by a widow except when it is vested in the adopting widow, or by survivorship in the members of the joint family to which the adoptive father belonged. A widow, however, is entitled to a provision of suitable maintenance out of the estate of which she is divested.[2] When an adopted son brings a suit for possession of such property against the adopting widow, he is to get a decree

[1] *Sri Virada Pratápa Ragunada Deo* v. *Sri Brojo Kishore Patta Deo*, I L. R., 1. Mad., 69; L. R., 3 I. A., 154.

[2] *Mussamut Rutna Dobain* v. *Parladh Dobey*, 7 W. R., 450.

to entitle the adopted son to claim the estate of a collateral relation, succession to which opened before his adoption. Thus in a case[1] in which an adopted son claimed the estate of his adoptive father's paternal uncle, succession to which had on the death of his widow opened long before his adoption, it was held that he was not entitled to the property. On the same principle it has been held that even when the adoption was delayed by the fraud of the person in whom the succession vested, the adopted son was not entitled to take by inheritance any part of the estate of his uncle by adoption, succession to which had opened before his adoption and vested in a nephew.[2] On appeal, the Judicial Committee affirmed the decision and held[3] that an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral. The question of fraud was disposed of on the ground that as the succession had opened before the birth of the adopted son, it was impossible for him under any circumstances to have become an heir to the person whose estate he claimed.

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**Conclusion with respect to divesting by adoption.**—The conclusion, to which we come upon an examination of the above cases, is, that an estate vested by inheritance in other persons cannot be divested in favor of a son adopted by a widow except when it is vested in the adopting widow, or by survivorship in the members of the joint family to which the adoptive father belonged. A widow, however, is entitled to a provision of suitable maintenance out of the estate of which she is divested.[2] When an adopted son brings a suit for possession of such property against the adopting widow, he is to get a decree

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[2] *Mussamut Rutna Dehain* v. *Parladh Dobey*, 7 W. R., 450.

subject to the obligation to provide a sufficient maintenance to the adoptive mother.[1]

**Relation back of adoption, and alienations by widow before adoption.**—The divesting of the estate of the adopting widow and others, is explained by saying that an adopted son is in the same position as a posthumous son, and his inheritance dates from the death of the adoptive father; that an adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted son to succeed to his estate.[2] But we have already seen that this doctrine of relation back of the title by adoption is not admitted to be effectual for all purposes, for an adopted son is not entitled to the estate of a collateral relation by adoption, succession to which had opened before adoption. Nor is its application unrestricted even with respect to the estate inherited by the adopting widow from her husband or male issue, which on adoption becomes vested in the adopted son, but alienations of which, made under certain circumstances by the widow before adoption are not affected by it.

We have already seen that the widow's rights in the estate inherited by her from her husband are not in any way affected by the fact of her having an authority from her husband to adopt a son, such authority being absolutely non-existent until it is acted upon.[3] It follows therefore that such acts of hers as are authorized and would be binding on the reversioners will also bind the son subsequently adopted by her. It should be observed that (1) a Hindu widow in possession of the estate of her husband or other male relation by inheritance, is competent to surrender such estate, or rather relinquish her rights therein, to the next heir or the presumptive reversioner, so as to divest the estate from herself and vest the same absolutely in the next heir; (2) she is also authorized to alienate the estate or any part of it for legal necessity; and even without legal necessity a widow may, with the consent of her husband's kindred[4] or of the next male heir,[5] make an alienation so as to pass an absolute title to the transferee; she is likewise competent to make alienations that would be valid for her life.

If the widow absolutely divests the estate from herself by surrender or authorized alienation, then it would seem that the power of adoption becomes incapable of execution. As regards *bonâ fide* alienations made under circum-

[1] *Rakhmdbdi* v. *Rádhdbdi*, 5 Bom. H. C. R., A. C. J., 181 (193); *Jamnabai* v. [illegible] *Nahalchand*, I. L. R., 7 Bom., 225.

[2] 1 Strange's H. L. 101; 2 Strange, 127; *Raje Vyankatrav* v. *Jayavantrav*, 4, Bo[illegible] C. R., A. C. J., 191; *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[3] Lecture VI, *supra*, p. 247.

[4] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 Moore's I. A., 529 (5[illegible]

[5] *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, I. L. R., 10 Calc., 1102.

stances of necessity, or with the assent of the husband's kindred, they will be binding on the adopted son even when made in contemplation of his adoption and in defeasance of his rights. But as regards unauthorized alienations, an adopted son like the reversionary heir is not bound by the widow's acts, and his rights cannot be prejudiced by them.[1]

But there is this distinction between an adopted son and a reversionary heir, namely, that the latter becomes entitled to the estate on the death of the widow, whilst an adopted son does immediately on his adoption, take the estate by divesting the widow. Hence although an unauthorized alienation by the widow is perfectly valid for her life in ordinary cases, it stands on a different footing as against an adopted son. At the same time, it would be inequitable and very hard upon a *bonâ fide* purchaser for value, of the life-interest of the widow, to hold that an interest created by her in the exercise of her ordinary powers of dealing with the estate as a Hindu widow, is defeated by an adoption subsequently made; and it may be that the purchaser had no notice of the existence of the power of adoption.

In one case[2] the Calcutta High Court held that where a Hindu widow succeeds to the estate of her adopted son on his death, and then alienates the property, the subseqnent adoption by her of another son cannot divest the alienee of his rights under the alienation previously effected. The facts are not however, very clearly stated, and it is doubtful whether the alienation was declared good for the life of the widow or absolutely valid upon the ground of alleged necessity.

The Bombay High Court, however, have held that an adopted son is entitled to set aside a gift of ancestral immoveable property made by his adoptive mother previous to his adoption, upon the ground that an adoption by a widow has retrospective effect.[3] So, where a widow in order to redeem a mortgage effected by her husband, had mortgaged the property again for a larger amount than was necessary, and subsequently adopted a son, it was held that the adopted son was entitled to redeem the last mortgage, by paying the amount really required for liquidating the ancestral debt.[4] The principle upon which these decisions are based is, that an adoption by the wife is an adoption to the husband's estate.[5] But it seems to be anomalous that a Hindu widow who may

[1] *Ranee Kishenmunee* v. *Rajah Oodwant Sing*, 3 Beng. Sel. Reps., 304 (228); *Ramundas Mookerjee* v. *Mussamut Tarinee*, 7 Moore's I. A., 169 (179); *Lakshmana Rau* v. *Lakshmi Ammal*, I. L. R. 4 Mad., 160; *Rajkristo Roy* v. *Kishore Mohun Mozoomdar*, 3 W. R., 14; *Collector of Madura* v. *Mootoo Ramalinga*, 8 Moore's I. A., 397.

[2] *Gobindonath Roy* v. *Ram Kanay Chowdhry*, 24 W. R., 183; approved in *Kally Prossonno Ghosh* v. *Gocool Chunder Mitter*, I. L. R. 2 Calc., 295 (307).

[3] *Náthájí Krishndjî* v. *Hari Jágoji*, 8 Bom. H. C. R., A. C. J., 67.

[4] *Lakshman Bhâu Khohar* v. *Rádhábái*, I. L. R., 11 Bom., 609.

[5] *Râje Vyankatarav* v. *Jyavantrav*, 4 Bom. H. C. R., A. C. J., 196.

choose to enjoy a life-interest in her husband's estate or divest it from herself by an adoption, should be permitted to defeat an interest created by her in the exercise of her powers as a Hindu widow, by her own subsequent act of adoption, when by an antecedent arrangement made with the consent of the natural father of the adopted son she may reserve to herself substantially her interest as a Hindu widow in the husband's estate.

**Adoption pendente lite.**—An adopted son as such is like a begotten son entitled to the property of the adoptive father, by right of inheritance; accordingly when a child is adopted by a man governed by the Mitákshará law, or by a widow, he becomes in the former case a co-parcener of the adoptive father as regards the ancestral property, and in the latter, entitled to the adoptive father's estate by divesting the widow. An adoption in such cases, though attended with the effect of transferring property to the adopted son, cannot, on that account, be looked upon in the light of an alienation, if it takes place during the pendency of a litigation, so as to make the decree binding on the child adopted by the application of the doctrine of *lis pendens*. This point arose in a case[1] before the Bombay High Court, the facts in which were as follows:—One Chintaman had executed an instrument called *bakshishpatra* whereby he made a gift of the whole of his property to one Morbhat, and adopted a son during the pendency of a suit between him and the donee, in which the question in dispute was, whether the instrument was a deed or will, and which was decreed in favour of the donee; subsequently the adopted son brought a suit for recovering half of the property, and the question was, whether he was bound by the previous decree. Whereupon the Court made the following observations:—"We are of opinion that, inasmuch as Lakshman was certainly adopted before the hearing and decree in that suit, and might have been made a party to it, but was not, the proceedings therein do not bind him, and that, accordingly, he is at liberty to re-open the question whether the *bakshishpatra* was intended by Chintaman, when executing it, to operate as a deed or as a will. We cannot regard the adoption *pendente lite* as in the same predicament as an alienation *pendente lite*. If a legitimate son had been born to Chintaman during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must be made a party, and we think that a son adopted during the suit would have been in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's ancestral property according to the Hindu law in this Presidency. We do not think that the circumstance, that Chintaman may have adopted Lakshman for the purpose of endeavouring to defeat the *bakshishpatra*, alters the case. Whatever ril motive may have influenced Chintaman, he was doing that which, as a s ss

[1] *Rambhat* v. *Lakshman Chintáman Mayálay*, I. L. R., 5 Bom. 630.

Hindu, he had a right to do, and he was not under any obligation to Morbhat not to adopt; and even if he had so contracted with Morbhat, we doubt that such a contract could affect the validity of the adoption, although the right of Morbhat to retain the property, under the *bakshishpatra*, if it be a deed and not a will, may not be disturbed. Lakshman, an infant in his eighth year, was an innocent party, and the ceremony of giving and taking being duly performed by persons with full authority, he cannot be relegated to the family of his natural father. Taking this view of the adoption, we permitted Lakshman's pleader to argue that the *bakshishpatra* must be regarded as a will, and not as a deed."

**Rights of the adopted son of a disqualified person.**—We have already seen that a person who is excluded from inheritance may adopt a son; but a son adopted by him is not entitled to the same position as a real legitimate son of his occupies. Although in ordinary cases an adopted son is held to be entitled to all the rights and privileges of a natural born son, yet the same rule does not hold good in the present instance for the following reason: the adoptive father being excluded from inheritance, the adopted son must necessarily be precluded from claiming any rights through the father, to which the latter is not entitled. There is, no doubt, an exceptional rule which provides that the *aurasa* or begotten son and the *kshetraja* or wife's son of the disqualified persons are entitled to the share to which their father, if free from defect, would have been entitled. But as exceptional rules are strictly construed, the above rule has been construed in the Mitákshará[1] to exclude other descriptions of sons such as the adopted son from the right of inheriting through the father.

The author of the Dattaka-Chandríká, however, is of opinion[2] that although the adopted son of a disqualified person is not entitled to the share to which a begotten son is entitled, yet he is entitled to maintenance. He argues that when the wives of the disqualified persons, have been declared to be entitled to maintenance, it follows *a fortiori* that their adopted sons also must be entitled to the same right. It is difficult to see the cogency of this argument: a disqualified person who is excluded from inheritance has no right to the property, but he and his wife are expressly declared to be entitled to maintenance, and if he has an *aurasa* or begotten son, or a *kshetraja* or wife's son, such son is entitled, provided he is free from defects causing exclusion, to take the share which his father would have taken had he not been disqualified. These exceptional rules must be strictly construed; the disqualified person, therefore, who has no proprietory interest in the family property can by no means be supposed to possess the power of imposing a liability on the property by adopting a son. He is at liberty to adopt a son, but there is no reason why the maintenance of such son be a charge on the family property.

[1] Ch. II, Sect. X, paras. 9-11; see *supra*, p. 202.

[2] Dat. Chand. VI, 1.

LECTURE XI.

# EFFECTS OF INVALID ADOPTION AND LITIGATION RELATING TO ADOPTION.

Invalid or imperfect adoption and its effects—"Adopted son" in deeds and wills—Invalid adoption and *persona designata*—Suit for setting aside adoption.—Suit for declaring falsity of permission, and for an injunction restraining adoption—*Interim* injunction—Limitation for suits relating to invalid adoptions, when adoption made by widow, when adoption made by the father, starting point—Estoppel—Presumption of probability of adoption by sonless person—*Onus*, evidence, lapse of time, recognition and presumptions—*Res Judicata*.

**Invalid or imperfect adoption and its effects.**—We have already discussed the various grounds upon which an adoption is disapproved in the commentaries especially in the two leading treatises, and is pronounced invalid or void by our Courts of justice. They are—

1. The existence of a son begotten or adopted, and possessing the character of a son at the time of the adoption.

2. The simultaneous adoption of two sons.

3. The adoption by an unauthorized woman.

4. The adoption of an only son or the first-born son, or one of two sons.

4. The adoption of a boy without observing the rules of preference in selection, based upon proximity of relationship.

5. The adoption of a boy, involving incongruity of relationship, in other words, in violation of the rule of prohibited degrees for adoption.

6. The adoption of one belonging to a different caste, and,

7. The adoption of a boy whose age exceeds a certain limit, or upon whom certain initiatory ceremonies have been performed in his natural family.

It should be borne in mind that according to Hindu law an adoption consists of two elements, namely, *first*, the transfer to the adopter of the *patria potestas* or parental property by the gift and acceptance of the child, and *second*, the investment of the child with the rights of a son to the adopter; and it should further be remembered that the first element is present in every *de facto* adoption which must cause a change of paternity by severing the child's connection with the family of his birth, although the adoption may be liable to exception upon any of the above grounds, and in consequence the child adopted may not be clothed with all the rights of a son. For instance, a child adopted by a person having a real legitimate son in existence,[1] or one adopted without

[1] Dat. Mím. 6, 1-2; Dat. Chand. 6, 3.

observance of the prescribed form,[1] or adopted from a different caste,[2] is not entitled to a share of the adopter's property but only to maintenance and marriage expense.[3] A child again who is adopted after the completion of his fifth year or after the ceremony of tonsure has been performed upon him in the family of his birth is said to become a slave of the adopter.[4] So also a son begotten by a man on a woman who has been purchased is called a slave-son or a son of a very inferior *status*.[5] Jagannátha is of opinion that if a son is given by the father alone without the assent of the mother, he does not become the adopter's son, though the adopter acquires parental dominion over him by the father's gift. From these instances, it appears to follow that in all cases where the adopter and the giver are respectively competent to accept and give, the transfer of the paternal dominion is complete, and the child is severed from his natural family and becomes filially related to the adopter, though he may not acquire the perfect *status* of a son of his adoptive father. The Pundits consulted in several early cases gave it their opinion that when an adoption had been made with the Vedik rites, it could not be annulled.[6] You should also bear in mind what I have already told you, that the Hindu law does not contemplate an *Action* for rescinding an adoption or declaring it invalid, except by including it under that for Revocation of Gift, which might be brought by the giver alone for resuming an invalid gift;[7] but the gift of a son may be *improper* but not *invalid*, and therefore not resumable according to Hindu law.[8]

It would seem therefore that a *de facto* adoption may be imperfect or defective in so far as regards the adoptee's right to the property of the adopter, on account of the existence of some vitiating circumstance set forth above, but it cannot be pronounced invalid or void so as to lead to the conclusion that the original *status* of the adopted son in his natural family remains unchanged or unaffected by the adoption.

But we have already seen that according to the modern development of law, adoptions are declared by our Courts to be invalid or void upon some of the grounds enumerated above. An important question therefore arises as to the effect of such declaration upon the *status* of the adopted son. The question resolves itself into two branches: (1) What, if any, are the rights conferred upon the adoptee by an invalid adoption in the adoptive family? (2) Whether the adoptee's connection with the adoptive family is severed and his original

[1] Dat. Mim. 5, 45; 6, 3: Dat. Chand. 6, 3.
[2] Dat. Mim. 3, 1; Dat. Chand. 6, 4.
[3] Dat. Mim. 3, 3.
[4] Dat. Mim. 4, 22.
[5] Dat. Mim. 4, 75-79.
[6] *Huebut Rao Mankur* v. *Govind Rao*, 2 Borrodaile's Rep. 75 (89); *Ruvee Bhudr Sheo Bhudr* v. *Roopshunker Shankerjee*, *Idem.* 656 (662.)
[7] Dr. Wilson's Works Vol. V, 73.
[8] *Supra* pp. 151 & 337.

*status* in the family of his birth restored by the declaration of the invalidity of his adoption?

The solution of these questions is beset with considerable difficulty. The principles of equity and justice require that these questions should not be considered in a merely theoretical point of view, but should be dealt with in such a manner as is beneficial to the adopted son who is an innocent party to a transaction that affects him more than any other person.

On the one hand you may take the decisions of our Courts holding an adoption to be invalid or void, to mean consistently with the rules of Hindu law enunciated in the Sanskrit commentaries, that the adoption is imperfect or defective so that the adopted son is not, owing to some circumstances, entitled to the same position as a regularly adopted son, still he is filially related to the adopter though holding an inferior *status*, and as such, entitled to maintenance and expenses of his marriage, and not to a share of the adopter's property. It should be remembered that the validity of an adoption may be impeached a long time after it has taken place, and after all the initiatory rites of the adoptee including his marriage have been performed in the adoptive family; and it may be that his marriage has taken place with a damsel belonging to the very *gotra* or family of his birth, who is beyond the sapinda-relationship; and it may also be that at that time it is impossible for him to regain his position and right in his natural family, being lost to him by lapse of time. Under such circumstances it would be preferable for him to be satisfied with the inferior position which the Hindu allows him, namely, that of a dependent member of the adoptive family.

On the other hand it may very reasonably be said that the above effect of an invalid adoption, according to Hindu law, is founded upon the father's absolute dominion over his child, which a father can no longer claim to exercise. Now that slavery has been abolished, a father cannot make a gift of his son except for the purpose of adoption; and the gift by the father can by no means affect the *status* of the son, if the adoption is irregular and cannot secure to the boy all the rights of a son of the adopter. Hence if the adoption be invalid, his original *status* in his natural family must necessarily remain unchanged and unaffected. This view is, no doubt, perfectly correct in theory, but is attended with practical difficulties, and may, instead of being beneficial to the adopted son, be most injurious to his interests, especially when the validity of an adoption is called into question after the lapse of considerable time fro[illegible]'s *factum*.

With respect to an adoption of a boy of a different class from the ad[illegible]; Sir Thomas Strange adopts the view expressed in the two leading treatises [illegible] says that "it divests the child of his natural without entitling him to [illegible] substituted claims incident to an unexceptionable one; and that he is entit[illegible]

maintenance only."[1] The same view is more generally expressed in Strange's *Manual of Hindu Law*,[2] thus,—"The severance of the boy from his natural family by gift made of him for adoption is so absolute that he cannot be re-attached to his natural family, or be re-admitted to his rights of property therein, even should his adoption into the adopting family not stand good in law. Being devoid of inheritance in either family, he remains a charge upon his adopter for maintenance." In one case[3] it was held by the Madras High Court that a Hindu whose adoption is invalid is entitled to maintenance in the adoptive family. The Calcutta High Court also expressed an opinion that if the adoption of a person be invalid, he would lose is right of inheritance from his natural parents.[4] On this point Colebrooke remarks,—"Children becoming slaves, through a failure in the requisites of adoption, must be ranked in the most favourable class, that of slaves maintained in consideration of service; who are entitled to their immediate release, on relinquishing the maintenance."[5] You should bear in mind that when Colebrooke made this observation, slavery was not abolished in India. According to his opinion, the adopted person has the option of continuing in the adoptive family or returning to his natural family.

But in a later case[6] the Madras High Court held that a person who had been adopted by an unauthorized widow, and whose adoption was therefore invalid, was not entitled to maintenance. The Court also expressed an opinion that the natural rights of a person invalidly adopted, remain unaffected by the invalid adoption. It should, however, be observed, that if the widow lived long after the adoption, the validity of which is impugned by the reversioner after her death, when by the lapse of time the adopted son's right of inheritance from his natural parents may be barred by limitation, it would be useless to declare that his natural rights are unaffected by his invalid adoption; and it would be a great hardship on him, if he be not entitled to even the right to maintenance in the adoptive family. The reversioner who remained silent so long as the widow was alive, cannot reasonably complain, if the adopted son be declared entitled to maintenance out of the adoptive father's property.

In another case[7] before the Supreme Court of Calcutta the question was incidentally considered, and the following opinion was expressed,—"It has

[1] 1 Strange's H. L., 82. [2] § 119.

[3] *Ayyávu Muppanár* v. *Niládatchi Ammál*, 1 Mad. H. C. R., 45.

[4] *Eshan Kishore Acharj Chowdhry* v. *Hurish Chunder Chowdhry*, 21 W. R., 381; 13 B. L. R., Appx. 42.

[5] 2 Strange's H. L., 223.

[6] *Bawáni Sankara Pandit* v. *Ambabáy Ammál*, 1 Mad. H. C. R., 363.

[7] *Sreemutty Rajcoomaree Dassee* v. *Nobcoomar Mullick*, 1 Boulnoi's Report, 137; 2 Sevestre 641 note.

been said on one side and denied on the other (neither side producing either evidence or authority in support of their contention) that a Dattaka, or son given, would forfeit the right to inherit to his natural father, even though he might not, for want of sufficient power, have been duly adopted into the other family. This proposition seems to be contrary to reason, but for all that, may be very good Hindu Law. But from the enquiries we have made, we believe the true state of the law on the subject to be this. There may undoubtedly be cases in which a person, whose adoption proves invalid, may have forfeited his right to be regarded as a member of his natural family. In such a case some of the old texts speak of him as a slave, entitled only to maintenance in the family into which he was imperfectly adopted. But one very learned person has assured me, that the impossibility of returning to his natural family depends, not on the mere gift or even acceptance of a son, but on the degree in which the ceremonies of adoption have been performed; and that there is a difference in this respect between Brahmans and Sudras. A Brahman being unable to return to his natural family if he has received the Brahmanical thread in the other family; the Sudra, if not validly adopted, being able to return to his natural family at any time before his marriage in the other family. Even if it be granted that a person, merely because he is a Dattaka, or son given, apart from the performance of any further ceremony, becomes incapable of returning to his natural family, that rule would not govern the case of an adoption that was invalid because the widow had not power to adopt. For to constitute a Dattaka, there must be both gift and acceptance. A widow cannot accept a son for her husband unless she is duly empowered to do so, and, therefore, her want of authority, if it invalidates the adoption, also invalidates the gift."

We have already seen that the performance of the initiatory ceremonies upon a person in the name of a *gotra* is considered to have the effect of irrevocably fixing his position in that gotra, hence a person upon whom these ceremonies have been performed in the name of the adoptive family cannot return to his own, notwithstanding the adoption may be invalid.[1] It is difficult to see why that rule would not govern the case of an adoption that was made by an unauthorized widow; for, the ceremonies in such a case also must be performed in the name of her husband's gotra.

The equitable rule to follow seems to be that if there be delay on the part of those that are interested in challenging the validity of an adoption, the son adopted should be entitled to maintenance in the adoptive family in all cases, irrespective of the ground upon which the adoption may be invalid. And in addition to that right he should be declared entitled to his natural right

[1] *Ruvee Bhudr* v. *Roopshunker*, 2 Borrodaile, 656.

the family of his birth. The performance of the initiatory rites in the name of a family does not appear to offer any serious obstacle in claiming connection with another family when it is held in Bombay, and to a certain extent in Madras, that even a married man may be adopted. In such cases the person adopted may very well be regarded as a Dvyámushyáyana or son having a double relationship, by operation of law, in the same way as the adoption of a boy who is within five years, but upon whom tonsure has already been performed in his natural family, does, according to Nanda Pandita, constitute him a Dvyámushyáyana.[1]

It has been held that a suit would lie to obtain an injunction against any intervention of the adopted son whose adoption is invalid, in performing the *Shráddha* or other ceremonies for the benefit of the adopting father, or assuming the *status* of adopted son of him.[2]

**"Adopted son" in deeds and wills.**—From what has been observed above, it would appear that the distinction between a valid and an invalid adoption has reference only to the rights of the adopted son, and that the expressions perfect and imperfect adoption should rather be used to mark the difference in the *status* of the person adopted, whose connection with the adoptive family does arise in all cases; hence when there has been a *de facto* adoption, the child adopted may properly be described as the "adopted son" of the adopter.

But in construing deeds and wills the term 'adopted son' has all along been taken by our Courts to be intended to be used in the sense of a *valid* adopted son. Hence when a person described as adopted son is to take an interest under a deed or will, but his adoption is held to be invalid, the description is taken to be erroneous and due to mistake which is the result of the executant's ignorance of law, and the question arises whether, notwithstanding the misdescription, the person can take the benefit given to him by the instrument.

**Invalid adoption and persona designata.**—The rule of English law on the point is that "a mere misdescription of a legatee will not defeat the legacy where no fraud is imputed to the legatee."[3] The rule is explained thus,—"If the legatee does not possess the character under which the gift was made, then, if that character was assumed in *deception* of the testator, or if it is *reasonably* clear that the testator would not have made the gift, had it not been for the supposed existence of that character, the Court will construe the mention of the character as imposing a condition precedent to the gift taking effect."[4]

This rule has been extended to cases in which a gift is made to a person who is described as 'adopted son'; and the principle which has been followed

[1] Dattaka-Mímánsá, 4, 32.

[2] *Kalova Kom Bhujangrav* v. *Padapa Valad Bhujangrav*, I. L. R., 1 Bom., 248.

[3] *Monemothonauth Dey* v. *Ononthanauth Dey*, 2 Indian Jurist, N. S., 46.

[4] *Siddessory Dassee* v. *Doorgachurn Sett*, 2 Indian Jurist, N. S., 23.

is, that when a gift is made to an ascertained person who is described as adopted son, the motive of the gift, as gathered from the instrument, is to be taken as the guide for deciding whether the gift is to take effect even if the adoption be bad in law. If it appears that the donor intended to make the gift to the designated person, irrespective of the consideration of the adoption being good or bad, the gift must take effect. If, on the other hand, it appears that the motive for the gift was that the intended donee possessed the character of adopted son, then if the adoption be invalid, the gift must fail.

In order to understand whether a gift to a person described as adopted son, who has been adopted but whose adoption is invalid, or who may not be adopted at all, is effectual or not, let us consider the different cases in which the question may arise: They are as follows:—

1. When the gift is made to a person named, or to an ascertained and known person though not named, who has been adopted by the donor himself.

2. When the gift is made to a person named or indicated who has not been adopted by the donor himself, but whom the donor directs his widow to adopt.

3. When the gift is made to an unascertained person whom the widow of the donor may adopt under his permission.

In the first two cases, the donee is a known or ascertained person, and the same principle governs the validity or otherwise of the gift made to him in both cases. If it appears from the document that there is a clear gift to the person, and there is nothing to indicate that the donor intended to attach the character of adopted son to the description of his donee, with a view to make the possession of that character condition precedent to the gift taking effect, then the donee is entitled to take the gift.[1] It should be borne in mind that the answer to the question in each case must depend upon the construction of the terms of the document, and the surrounding circumstances.[2] In the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*[3] before the Privy Council, the gift was contained in the following words:—

"And as I am desirous of adopting a son, I declare that I have adopted Koibullo third son of my eldest brother. My wives shall perform the ceremonies according to the Shastras, and bring him up, and until that adopted son comes of age, those executors shall look after, and superintend all the property moveable and immoveable, in my own name or benami, left by me, also that adopted son. When he comes to maturity, the executors shall make over everything to h a to

[1] *Monemothonauth Dey* v. *Onanthanauth Dey*, 2 Indian Jurist, N. S., 22; *Jivan* [illegible] v. *Jivu Bhai*, 2 Mad. H. C. R., 462.

[2] *Fanindra Deb Raikat* v. *Rajeswar Dass*, I. L. R., 11 Calc., 463.

[3] L. R., 3 I. A., 253.

his satisfaction. ... God forbid, but should this adopted son die, and my younger brother Nilruttun have more than one son, then my wives shall adopt a son of his. If at that time Nilruttun has not a son eligible to adoption, they shall adopt another son of Saroda, and the wives and executors shall perform all the afore-mentioned acts."

The Lords of the Judicial Committee without deciding the question of fact whether the wives of the testator had performed the ceremonies as directed by the testator, held that the gift did take effect, and the reasons assigned for that conclusion are set forth in the following passage:—

"The effect of the will according to their view is this: 'I declare that I give my property to Koibullo whom I have adopted.' There is a gift of his property by the testator to a designated person. This direction follows, 'My wives shall perform the ceremonies according to the Shastras, and bring him up.' Undoubtedly the testator desired and expected that the wives should perform certain ceremonies. He requested them to do so. But it appears to their Lordships that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. If they did not, it may be that the adoption is not in all respects complete, although their Lordships by no means decide this, or give any opinion on the subject. Be that as it may, the gift of the property nevertheless takes effect. The provision 'God forbid, but should this adopted son die, and my younger brother Nilruttun have more than one son, then my wives shall adopt a son of his,' further indicates that the testator did not contemplate his widows having the power of cancelling the adoption of Koibullo, and ousting him from the benefit he was to take under the will by declining to perform the ceremonies. Whether they performed the ceremonies or not, it is certain that as long as Koibullo lived, no other adoption could take place."

The same rule would apply also where, instead of an express gift, there is a gift by implication.[1]

But even when the donee is a *persona designata*, he will not be entitled to take the interest, if the character of adopted son appears to be the moving consideration for the gift, or if there is no clear gift,[2] but the testator appears simply to contemplate and state what the person would in the character of adopted son take agreeably to the law of inheritance. Accordingly when the testator directed his widow to adopt a particular person or a person standing in a particular degree of relationship to another individual, and appointed the person as

[1] *S. M. Dass Money Dassee* v. *S. M. Prosonomoye Dassee*, 2 Indian Jurist, N. S., 18; see also

[2] *Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 Moore's I. A., 279; 3 W. R., P. C., 15.

his heir, but his adoption appeared to be intended as a condition precedent to his taking the inheritance, it was held that the person if not adopted could take nothing under the will.[1] Similarly in a case[2] in which a man adopted one Rajeswar as his son and executed a document called *Angikar-patra* whereby he appointed him his heir, it was held by the Judicial Committee that the adopted son could not take anything as the adoption was invalid. Their Lordships explain the law on the subject in the following part of the judgment:—

"Their Lordships feel no difficulty about Rajeswar being sufficiently designated as the object of the gift, although the adoption may not be valid. They think the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it. The words are,—'I authorize you by this *angikar-patra* to offer oblations of water and *pinda* to me and my ancestors after my death by virtue of your being my adopted son. Moreover you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my *dena-pawna* (debts and dues), and you and your sons and grandsons shall enjoy them agreeably to the custom of the family.' He is to make the offerings by virtue of being an adopted son, and 'moreover' he is to become the proprietor. This is to be the consequence of the adoption. In fact the *angikar-patra* only states what would have happened without it. The distinction between what is description only and what is the reason or motive of the gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to his 'wife A. B.,' believing the person named to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator. It is difficult to suppose a case similar to the present coming before the English Courts. In *Wilkinson* v. *Joughin*[3], a testator bequeathed his real and personal estate to trustees, upon trust to permit his wife Adelaide to receive the net annual income thereof during her life, and after her death, if no child of his should attain twenty-one, or be married, in trust for his stepdaughter Sarah Ward (the daughter of the supposed wife) for her absolute use.

"The supposed wife and the testator went through the ceremony of marr

[1] *Karsandás Náthá* v. *Ládkávahu*, I. L. R., 12 Bom., 185; *Shamávahoo* v. *Dwa* *Idem.*, 202.

[2] *Fanindra Deb Raikat* v. *Rajeswar Das*, I. L. R., 11 Calc., 463.

[3] L. R., 2 Eq., 319.

she having represented herself to the testator as, and he having believed her to be, a widow, her husband being then alive. It was held by the Vice-Chancellor that the bequest to her was wholly void, but the bequest to the daughter was valid. This was apparently on the ground of the intention, the Vice-Chancellor saying, 'In my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description.'"

Then referring to the directions[1] in the will of the testator in the case of *Nidhoomoni Debya* v. *Saroda Persad Mookerjee*, their Lordships go on to observe:—"The ceremonies of adoption had been performed by one of the widows only, and the other brought a suit to recover half of the property. This Committee held that she could not do so, that there was a gift of his property by the testator to a designated person, and it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibullo to be entirely dependent on whether the wives chose or did not choose to perform the ceremonies. The intention of the testator appears to have been the ground of decision in this case also, but both the words of the instrument and the nature of the property were very different from the instrument and property now in question. In the present case their Lordships are of opinion that it was Jogendra's intention to give his property to Rajeswar as his adopted son, capable of inheriting by virtue of the adoption, and the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate is not applicable. As the adoption was contrary to the customs of the family and gave no right to inherit; the *angikar-patra* had not any effect upon the property."

When, however, a gift is made to a person who is to be adopted by the testator's widow under his permission, but the particular person to be adopted is not designated or indicated, then the doctrine of the donee being a *persona designata* cannot apply should the adoption be invalid, the person to be adopted by the widow being unascertained. Hence a person *de facto* adopted by the widow cannot take the gift, if his adoption be, for any reason, unlawful. In a recent case[2] before the original side of the Calcutta High Court, in which the testator by his will directed each of his two wives to adopt a son, and gave his property in equal shares to the two sons to be adopted, and his two widows adopted two sons agreeably to his wishes, and the question was whether these sons whose adoption was invalid could take under the will, the Court of first instance held upon the authority of the ruling in *Dey* v. *Dey*[3] that they were entitled to take as *personæ designatæ*. On appeal, however, the two cases were distinguished and

[1] See *Supra* p. 426.

[2] *Doorga Sundari Dassee* v. *Surendra Keshav Rai*, I. L. R., 12 Calc., 686.

[3] 2 Indian Jurist, N. S., 24.

it was held that the adopted sons could not take under will as there was no sufficient *designatio* of their persons. The reasons upon which the decision is based are contained in the following passages of the judgment:—

"The learned Judge in the Court below based his decision upon the authority of a case of *Monemothonath Dey* v. *Onathnath Dey*[1], but that case appears to us to be very distinguishable from the present. In that case one Promothonath Dey, having no male issue, adopted two sons, Monmothonath and Surathnath, at one and the same time, and he gave one of his sons so adopted to each of his two wives.

"He afterwards made a will in favour of these two sons, whom he described in his will *as his adopted sons*, and he provided that if either of them should die the adoptive mother of that son should be at liberty to adopt another son.

"A suit being brought after the testator's death to determine the rights of the parties under this will, it was held that the simultaneous adoption of the two sons was invalid; and then the question arose, whether there was such a *designatio* of the two persons known and described as the testator's adopted sons in the will, as to enable them to take under the will, though the adoption was in fact invalid; and it was held that there was.

"They had been always considered and known as the testator's adopted sons, and therefore their description in the will was a sufficient *designatio personarum* to make it clear that they were the persons whom this testator intended to benefit.

"Then one of these sons, Surathnath, having died, his adoptive mother, by virtue of the power contained in the will, adopted another son, Onathnath; and that adoption being valid, it was held that his description also in the will as the adopted son of the testator was sufficient to make the devise in his case valid.

"There were therefore in this case three instances in which the rule of *designatio personæ* properly applied; in the case of the first two devisees, because they were both described, and generally known as the adopted sons of the testator, although their adoption was in fact invalid; and in the case of the last, Onathnath, because he was *actually* adopted in the way provided by the will.

"But in the present case the facts were quite different. The testator had no doubt provided in his will that each of his wives should adopt a son; and he gave his property to the sons *so to be adopted;* but he did not provide, nor did he know, who the adopted sons were to be; and, therefore, as the adoption which took place was invalid, the persons purporting to be adopted did not answer the description in the will of adopted sons, or in other words there was not a sufficient *designatio* of their persons to enable them to take under the will."

But it should be noticed that a gift to a son to be adopted by the widow

[1] 2 Indian Jurist, N. S., 24.

will take effect, if the adoption by her is unexceptionable; for, the son so adopted becomes a *persona designata*, according to the explanation given in the above case of *Dey* v. *Dey*,[1] with respect to the gift made to the third adopted son. And, although the child adopted by the widow may not have been in existence at the time of the adoptive father's death, yet the general rule of Hindu law that a person capable of taking under a will must be in existence at the death of the testator, does not affect the validity of a gift to a son adopted by a widow, who in contemplation of law is deemed to be in existence at the time of the adoptive father's death for the purpose of inheriting or otherwise taking from him.[2]

**Suit for setting aside adoption.**—If an adoption be contrary to law upon any ground, a suit may be instituted either by the adoptive parents or their heirs and reversioners for a decree setting it aside or declaring its invalidity. The right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property, has been recognized by the Legislature in the Court Fees Act VII[3] of 1870 and in the Limitation Acts IX[4] of 1871 and XV[5] of 1877.[6] If through ignorance of law or fact, a person does adopt a child whom he could not lawfully adopt and whom he would not have adopted if the real facts had been known to him, he would be entitled to have the adoption declared invalid. He would in fact have the right to have it set aside upon the same grounds such as coercion or fraud, upon which a Court of Equity would relieve a person from the effects of his own contract. The free consent of the giving and the receiving parents is indispensable. In the case of women, and in that of minors, adopting a son, there is room for abuses; accordingly it has been held that fraud and cajolery practised on a widow in inducing her to adopt, or the suppression and concealment of facts from her vitiate an adoption;[7] and that a Hindu female, acting without the independent advice of disinterested persons ought not to be prejudiced by her acquiescence in an adoption.[8]

But a valid adoption cannot be cancelled or revoked either by the adoptive or the natural father.[9] "The adoption," Colebrooke said, "being once com-

[1] 2 Indian Jurist, N. S., 24.

[2] *Jotendromohun Tagore* v. *Ganendromohun Tagore*, 18 W. R., 359 (365.)

[3] Schedule II, Article 17, Clause V.

[4] Schedule II, Article 129.

[5] Schedule II, Article 118.

[6] *Kalova* v. *Padapa*, I. L. R., 1 Bom., 248.

[7] *Bayábdi* v. *Bálá Venkatesh Ramákánt*, 7 Bom. H. C. R., Appx. I (XXII); *Somasekhara Rája* v. *Subhadramáji*, I. L. R., 6 Bom., 524.

[8] *Tayammaul* v. *Sashachalla Naikar*, 10 Moore's I. A., 429.

[9] *Huebut Rao Mankur* v. *Govind Rao*, 2 Borrodaile, 89; *Sukhbasi Lal* v. *Guman Sing*, I. L. R., 2 All., 366.

pletely and validly made, it cannot be recalled."[1] Nor can an adopted son renounce his family of adoption or give up the *status* created by adoption.[2]

An adoption by a widow appears to be looked upon as an alienation by her of her husband's estate, for the purpose of a suit for declaring its invalidity. Accordingly it has been held that a person who is not the reversioner, has no right, even with the consent of the presumptive reversionary heirs, to sue for a decree declaring an adoption to be invalid.[3]

With respect to the right of contingent reversioners to bring a suit for setting aside an adoption made by a widow, the Judicial Committee observe as follows[4]:—"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Ahaji* v. *Jagannath Vithal*[5] is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue; see *Kooer Golab Sing* v. *Rao Kurun Sing*.[6] In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

The general rule mentioned above is also laid down by the Legislature while dealing with the subject of Declaratory Decrees in the Specific Relief Act.[7]

But it should be borne in mind that it is discretionary with the Court to grant a declaratory decree or not in a particular case. On this point the Judi-

[1] 2 Strange's H. L., 111.

[2] *Ruvee Bhudr* v. *Roopshunker*, 2 Borrodaile, 713.

[3] *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 W. R., 463.

[4] *Rani Anand Kunwar* v. *The Court of Wards*, I. L. R., 6 Calc., 764; 8 C. L. R., 38

[5] 10 Bom. H. C. R., A. C. J., 351.

[6] 10 Moore's I. A., 176.

[7] Act I of 1877, Section 42, Illustration (*f*).

cial Committee observe as follows,—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the case, to grant the relief prayed for. There is so much more danger than here of harrasing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."[1] Accordingly in a case[2] in which a Talukdar died leaving a widow, and also a son who having succeeded as Talukdar, died childless; and this son's widow being in possession of his estate sued for a declaration that an adoption made by her mother-in-law was void and ineffectual, upon the ground that at some time or other after her death the person so adopted might claim to obtain the estate, unless his adoption should now be negatived,—the Privy Council refused to make the declaration, holding that the question whether he was validly adopted or not would be decided if the person alleged to have been adopted should bring a suit afterwards.

**Suit for declaring the falsity of permission, and for an injunction restraining adoption.**—But, although a reversioner is thus permitted to have a decree declaring the invalidity of an adoption, it has been held by the Calcutta High Court in one case[3] that under Act VIII of 1859, Section 15, a suit would not lie at the instance of the reversionary heir for a declaration that the permission set up by the widow of a deceased Hindu is false, and to have the same cancelled, and for an injunction restraining the widow from adopting a son. The Court in coming to this conclusion relied upon a judgment of the late Supreme Court in two cross suits,[4] in one of which a Hindu widow asked for a declaration that she was entitled to adopt a son by a verbal authority received from her husband before his death, and in the other the reversionary heirs asked for an injunction to restrain the widow to adopt a son,—whereby both the prayers were rejected as the Court did not think it right, under the circumstances of the case, to exercise their discretionary power. The High Court also relied upon the decision of the Privy Council in a case,[5] holding that a suit brought by a Hindu widow against the father of a child, for setting aside two deeds, one of which called *dan-patra* or deed of gift was executed by the defendant in favour

[1] *Sreenarain Mitter* v. *Kishen Soondery Dassee*, 11 B. L. R., 171; L. R., I. A., Sup. Vol., 149; 19 W. R., 133.

[2] *Pirthi Pal Kunwar* v. *Guman Kunwar*, I. L. R., 17 Calc., 933.

[3] *Run Bahadur Sing* v. *Musst. Lucho Coowar*, 4 C. L. R., 270.

[4] *Sreemutty Rajcoomaree Dassee* v. *Nobocoomar Mullick*; and *Nobocoomar Mullick* v. *Sreemutty Rajcoomaree Dassee*, 1 Boulnois, 137.

[5] *Sreenarain Mitter* v. *Kishen Soondery Dassee*, 11 B. L. R., 171; L. R., I. A., Sup. Vol., 149; 19 W. R., 133.

of the plaintiff, and the other called *grahan-patra* or deed of adoption by the latter in favour of the former, upon the allegation that they were mere agreements to give and take the child in adoption but no adoption had taken place,—was not maintainable on the ground that the child who could be, but was not, properly made a party to the suit; and the reasons for the decision are explained in the following passage:—"The child is no party to the present suit, and any declaration made in it with regard to the validity or invalidity of the deeds, will not be binding upon him if a suit be hereafter brought on his behalf against the present plaintiff respecting the estate of her deceased husband; nor would it be binding in any suit between the child and the reversionary heirs of the deceased husband after the death of the plaintiff; or between the child and any other child who, upon the faith of a declaratory decree in this suit, may hereafter be given in adoption or adopted by the widow, or between the child and his natural brothers, or any other person who may hereafter claim to exclude him from the heritage of his natural father's property upon the ground that he has been adopted into another family. It appears to their Lordships that, under these circumstances, it would not be exercising a sound discretion even if it could be done, to order the deeds to be cancelled or to set them aside, or to declare them void. The defendant takes no interest under the deed of adoption; a declaration binding upon him only, and not upon the child, would be worse than useless, for it would not protect the plaintiff, or any child whom she may adopt, from any claims on behalf of the defendant's son to the estates; and it might induce some other person to give his son to the plaintiff in adoption and also induce the plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them."

There was an unreported decision[1] of a Division Bench of the same Court the other way, but no importance was attached to it as the above decision of the Privy Council was not considered in it. But the Court made the following observation[2] with respect to the change in the law relating to declaratory decrees:—"The 15th section of the Code of 1859 is no longer in force, and has been replaced with material variation by section 42 of the Specific Relief Act; thus the question, if it should again arise, will have to be considered with reference to the words of the new Act."

In a recent unreported case[3] a Division Bench of the same Court (Justices Norris and Beverley) have held that a suit of this description may be entertained under Section 39, and Section 42 of the Specific Relief Act, and a declaration granted, if having regard to the circumstances of the case, the Court in the exercise of its discretion think that the declaration should be made.

[1] M. S. Reg. Ap. 53 of 1877. [2] 4 C. L. R., 273.

[3] A. O. D. No. 4 of 1887, *Mussummat Rajputy Koeri* v. *Mussummat Nripabati.*

**Interim injunction.**—But although a suit for an injunction on the widow to restrain adoption may be entertained, the Court will refuse an *interim* injunction, considering the religious importance of an adoption which cannot be made by any other than the widow and which would be absolutely prevented if the widow should die.[1]

**Limitation for suits relating to invalid adoption.**—The validity of an adoption may be called into question either in a suit relating to property or in a suit for a declaration that an adoption is invalid. We have already seen that a suit for having an adoption declared invalid may, as a general rule, be brought only by the presumptive reversioner whose contingent right to property is affected thereby. The question of the validity or otherwise of an adoption is considered as ancillary to right of property, and the law of limitation is construed as if an adoption were merely an appointment of an heir or an alienation of property. But it should be observed that the kinsmen of the adoptive and the natural parents of the child adopted are, according to the Dattaka-Mímánsá, presumed to be assenting parties to the adoption; for, Nanda Pandita draws that presumption from the provision made in the ritual of adoption for the convention of the kindred, and maintains that the father of the natural mother is a party to the gift of the boy in adoption.[2] Every adoption again, according to Hindu law creates a change in the status of the child by severing his connection with the natural relations and by establishing his filial relation to the adopter, though it may be imperfect on account of some defects which are of no importance whatever in a social or moral or religious or rational point of view. An adoption does further create a religious communion of the child with the kindred of the adoptive parents, and it establishes their mutual right of inheritance from each other, so that the relations of the adoptive parents cannot look upon it as an indifferent act, of which they need not take notice until it actually affects any right to property. It appears therefore, equitable and just that, if an adoption be really defective, a short period of limitation should be provided for suits to have the adoption declared invalid or void, seeing that by lapse of time the child who is perfectly innocent, may be deprived of all his rights in his natural family, and cannot be restored to his original position which he loses by reason of the adoption presumably made with the assent of all the kinsmen of the natural and the adoptive parents. But the rules of limitation do not rest on the discretion of the Courts, and are based upon express enactments of the Legislature; let us therefore proceed to examine the provisions of the statutes of limitation, bearing on suits relating to adoption.

**When adoption is made by a widow.**—Under Act XIV of 1859, there

[1] *Assur Purshotam* v. *Ratanbai*, I. L. R., 13 Bom., 56.

[2] Dat. Mím. vi, 51.

was at first a conflict of authority on the question whether in a suit by a reversioner to set aside an adoption made by a widow and to recover possession in right of inheritance, the cause of action arose from the time when the adopted son was put in possession as such, or from the death of the widow; and it was settled by a Full Bench[1] who held that the cause of action did not arise till the death of the widow. This decision was approved by the Judicial Committee in another case[2] in which it was held that time would only begin to run from the date of the widow's death.

The Limitation Act IX of 1871, contained a distinct rule on this point, according to which twelve years was the period of limitation for a suit to establish or set aside an adoption, and the time began to run from the date of the adoption, or at the option of the plaintiff, from the date of the adoptive father's death.[3] It was also provided in this Act that for a suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow, for possession of the same, the period of limitation was twelve years, and the time began to run from the widow's death.[4] At first it was thought that no change in the law was made by this Act, and the Judicial Committee expressed an opinion that the above provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside an adoption, does not interfere with the right which, but for it, a plaintiff had of bringing a suit to recover possession of real property within twelve years from the time when the right accrued:[5] and it was held on the authority of this opinion that a suit to set aside an adoption which was alleged to have taken place twenty years before, was not barred as it was brought within twelve years of the widow's death.[6] But in a later case[7]—in which a reversionary heir brought a suit to recover possession of immoveable property by setting aside two adoptions made by widows; eighteen years after the latest of them, but within six years after the death of the surviving widow,—the Judicial Committee held that the suit was barred by limitation. Their Lordships point out that "the expression 'suit to set aside an adoption' is not quite precise as applied to any suit: an adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all." Then, referring to several cases in which that expression is used, their Lordships go on to explain the law in the following passages:—

[1] *Sree Nath Gangooly* v. *Mohesh Chandra Roy*, 12 W. R., F. B., 14: 4 B. L. R., F. B., 3.

[2] *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*, 13 Moore's I. A., 67; 7 B. L. R., [illegible]; 15 W. R., P. C., 41.

[3] Second Schedule, Article 129.

[4] *Idem.* Article 142.

[5] *Raj Bahadoor Sing* v. *Achumbit Lal*, 6 C. L. R., 12; L. R., 6 I. A., 110.

[6] *Purna Narain Adhikar* v. *Hemokant Adhikar*, 6 C. L. R., 146.

[7] *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, I. L. R., 13 Calc., 308.

"It thus appears that the expression 'set aside an adoption' is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 128 of Act XV of 1877, which corresponds to Art. 129 of 1871, so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable.

"If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiff's counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within 12 years from the adoption, while yet the very same issue is left open for 12 years after the death of the adopting widow, it may be 60 years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

This decision is undoubtedly based upon the loose expression used in Article 129, but at the same time their Lordships also assign in support of it, some reasons that may furnish an argument for contending that the law on the point remains unchanged by the present statute, although there is an alteration of the language.[1] The present Act provides that the period of limitation is six years for a suit "to obtain a declaration that an alleged adoption is invalid, or never in fact took place," and that the time is to begin to run from the date "when the alleged adoption becomes known to the plaintiff."[2] The starting-point

[1] Mayne's Hindu Law, § 150.

[2] Act XV of 1877, 2nd Schedule, Article, 118.

assigned to the time may also lend some support to the above contention: for, if the intention of the Legislature had been that the Article applied only to an optional suit by the reversionary heir for a mere declaration during the lifetime of the adopting widow, the date of adoption would have been laid down as the starting point, just as the date of alienation is the starting point in the case of a similar suit relating to an unauthorized alienation made by the widow.[1] It may likewise be argued that Article 119 also supports the above view; for, it says, "To obtain a declaration that an adoption is valid, the period of limitation is six years and begins to run from the time when the rights of the adopted son as such are interfered with"; and the language describing the suit is similar to that in the preceding Article; but this Article does not seem to contemplate a merely declaratory suit, since the description of the starting point shews that the plaintiff's rights have been interfered with, who must therefore ask for further relief than a mere declaration.

But the present Statute of Limitation has been construed by the Indian Courts so as to place the law on the same footing in which it had stood under Act XIV of 1859 and before Act IX of 1871 came into operation. It has been held that Article 118 of Act XV of 1877 applies only to declaratory suits;[2] and a reversioner who neglects to bring such a suit during the lifetime of the widow is not thereby debarred from suing for possession of the estate when he becomes entitled to the same on the death of the widow. He is held to be competent to bring a suit for recovery of possession notwithstanding the adoption, within twelve years from the date of the widow's death under Article 141.[3]

The Calcutta High Court also have taken the same view of the present law, but have expressed an opinion that if the adoption had taken place more than twelve years before the present Act came into operation, the adoption would become perfect by efflux of time under the Act of 1871.[4]

**When adoption was made by the father.**—When, however, the adoption was made by the father, and on his death, the adopted son took possession of the adopter's estate adversely to his widow, and the reversioner brought a suit for possession within twelve years after the widow's death, but more than twelve years after the adopter's death, it has been held that adverse possession which barred the widow barred also the reversioner, and that the case was not governed by Article 141 of the present Act.[5]

[1] Second Schedule Article 125.

[2] *Ganga Sahai* v. *Lekhraj Singh*, I. L. R., 9 All., 253 (268); *Padaji Rav* v. [illegible], I. L. R., 13, Bom,, 160 (165).

[3] *Basdeo* v. *Gopal*, I. L. R., 8 All., 644.

[4] *Lala Parbhu Lal* v. *Mylne*, I. L. R., 14 Calc , 401 (417). See Act XV of 1877 Sc[illegible] 2, *para.*, 12.

[5] *Ghandharap Singh* v. *Lachman Singh*, I. L. R., 10 All., 485.

**Starting point.**—In Article 129, Act IX of 1871 the starting point was either "the date of adoption or the date of the death of the adoptive father," and the expression "adoptive father" was held not to include the adoptive mother, and therefore in an adoption by a widow the time began to run from the date of adoption.[1] In Article 118 of the present law the time begins to run from the day when the adoption becomes known to the plaintiff. But the word "plaintiff" has been defined in the interpretation clause[2] to include also any person from, or through whom a plaintiff derives his right to sue; and the right to sue for a declaration that an adoption is invalid, depending as it does upon the reversionary right to the adoptive father's estate, may be derived from or through another person, the date of whose knowledge, therefore, would be the starting point.

**Estoppel.**—Considering the hardship upon the adopted son if his adoption be declared invalid where a length of time has elapsed since it was made, our Courts have applied the doctrine of estoppel to several cases of invalid adoption.

In a case[3] in which the adoptive father had presented a petition in the Revenue Court, admitting that he had adopted the defendant, by performing the requisite ceremonies, and thirteen years after had filed a compromise in a litigation between himself and the defendant, in which he said he will consider the latter as his adopted son, but subsequently sued for a declaration that the defendant was not his adopted son upon the grounds that he had not been adopted in the manner and according to the ceremonies required by Hindu law, and that he was not a fit and proper person to perform the religious rites for the spiritual benefit of the souls of himself and his ancestors,—it was held that the adoption could not be declared invalid or set aside. The reasons for the decision are contained in the following passage:—"The plaintiff having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by Hindu law, cannot now disaffirm it and sue for a declaration that it is invalid. Indeed, when the adoption has once been absolutely made and acted for years, it cannot be cancelled. It is certain that an adopted child cannot renounce the family of his adoptive father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father, in accepting an adopted son, is bound by his act, which secures to the adopted son all the rights of a son born to the family."

In another case[4] the widow who had adopted a son was held estopped from asserting that the adoption was invalid. The Court observed:—"She it was who took the plaintiff in adoption, and brought him up and married him as the

[1] *Siddhessur Dutt* v. *Sham Chand Nundun*, 23 W. R., 285.

[2] Act XV of 1877, Section 3.

[3] *Sukhbasi Lal* v. *Guman Singh*, I. L. R., 2 All., 366.

[4] *Rávji Vinayakráv* v. *Lakshmibai*, I. L. R., 11 Bom., 381 (396.)

adopted son of her husband, and put herself forward as his mother in Courts of law. How can she now, when he may have lost all right in his natural family, assert that she has not adopted him validly ?"

In another case[1] in which a sister's son had been adopted by a Brahmana, and there had been a long course of acquiescence of all the members of the family, the plaintiff included, in the validity of the sonship asserted, and the adopted son had through the influence of that course of representation, abandoned his rights to the property in his natural family, the Court were of opinion "that although the adoption was invalid and inadequate of itself to create communion, that communion has been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which has resulted."

In a similar case[2] the Judicial Committee observed as follows:—"If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the appellant's father three times deliberately styles the respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the respondent would of course not be entitled to that designation. They amount, therefore, to a complete admission of the whole title of the respondent, both in fact and in law, and show that the objections which have been urged to his claim, in the opinion of the appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindoo law and customs, had no foundation."

So where the defendant had actively participated in the adoption of the plaintiff by the defendant's brother, and had by many acts signified to the plaintiff and his adoptive father his complete acquiescence in the adoption, and had thereby encouraged the plaintiff, who was an adult, to assent to the adoption, and allowed the adopting father to die, in the belief that the adoption was valid, and had finally concurred in the performance by the plaintiff, of the funeral ceremonies of his adoptive father,—it was held that the defendant was estopped from disputing the validity of the plaintiff's adoption.[3]

But in the case of *Gopee Lall* v. *Mussamut Chundrabolee Buhoojee*[4] in which it was contended that the defendants who had in former suits and in various ways by letters and by their conduct, represented that a person who had in fact been adopted, was the adopted son of the adopter, were estopped from setting up the true facts of the case, or even asserting the law in their favour, the Judicial

[1] *Gópálávyan* v. *Rághupatiávyan*, 7 Mad. H. C. R., 250.

[2] *Ramalinga Pillai* v. *Sadasiva Pillai*, 9 Moore's I. A., 506.

[3] *Sadáshiv Moreshvar Ghâte* v. *Hari Moreshvar Ghâte*, 11 Bom. H. C R., 190; *Chintu* v. *Dhondu*, *Idem* note.

[4] 19 W. R., 12.

Committee overruled the contention by the following observations:—"But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties." It should be observed that this decision has to a great extent, modified the effect of the ruling above referred to.

Accordingly it has been held by a Full Bench of the Madras High Court[1] that the rule of estoppel by conduct does not apply where an adoption is made by a person in full belief that the adoption is valid in law, and thereby, and by the subsequent conduct of the adopter, the person adopted is induced to abstain from claiming a share in the inheritance of his natural family,—so as to prevent a person claiming through the adopter from impugning the validity of the adoption. The Court observed:—"On this issue the respondent's case can be put on no higher footing than this,—that, while no doubts were entertained by *Sankaran* (the adoptive father) as to the validity of such an adoption, he made the adoption and laid a foundation for the respondent's belief that the adoption was valid, and that his subsequent conduct contributed to the persistence of the respondent in that belief, and that in consequence of that belief the respondent abstained from claiming a share in the inheritance of his natural family. His conduct created no false impression as to any question of fact; the only error, if error it be, which it may have contributed to instil in the respondent's mind, was error on the question of law as to the validity of the adoption. The respondent was not induced to believe a thing to be true which was not true, but both he and *Sankaran* drew an indirect inference of law from facts admittedly true—*Bank of Hindustan* v. *Alison*,[2] *Morgan* v. *Couchman*.[3] To such a case we hold the rule will not apply."

**Presumption of probability of adoption by a sonless person.**—The importance of adoption by persons destitute of male issue, for religious purposes has been so much exaggerated in the two leading treatises on the subject, that regard being had to the same it was considered by the Privy Council in some early cases,[4] that there was strong probability in favour of an adoption by son-

[1] *Vishnu* v. *Krishnan*, I. L. R., 7 Mad., 3.

[2] L. R., 6 C. P., 54.

[3] 14 C. B., 100.

[4] *Huradhun Mookerjia* v. *Muthuranath Mookerjia*, 4 Moore's I. A., 414 *Soondur Koomaree Debbeea* v. *Gudadhur Pershad Tewaree*, 7 Moore's I. A., 54.

less Hindus. But the undisputable fact that the majority of the Hindus do not appear to attach great importance to the existence of a son, as a means of salvation, as many persons are found not to adopt sons though childless,—is opposed to any presumption of that kind. Accordingly in a later case[1] the Judicial Committee observe as follows:—"Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindu to adopt a son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death."

**Onus, evidence, lapse of time, recognition and presumptions.**—When the validity of an adoption is impugned, the questions of fact, that may arise for the consideration of the Courts, relate to the existence of authority in the case of an adoption by a widow, the actual gift and acceptance, the performance of religious ceremonies, and the existence of invalidating circumstances. Where the dispute arises after a length of time has elapsed from the *factum* of adoption which has been acquiesced in, and recognized by the parties interested in opposing it, then, although the lapse of time may not raise the bar of limitation, nor the acquiescence and recognition amount to an estoppel, yet they are important factors for the consideration of the Court while dealing with the evidence. Lapse of time or the acquiescence of parties interested in opposing an adoption may not be taken to be *primâ facie* evidence of its validity,[2] but taken with other evidence and circumstances of the case, may induce the Court to raise presumptions and dispense with strict proof of particular facts. Thus in adoptions made by widows, although the authority as a general rule must strictly be proved,[3] yet from the fact that a *de facto* adoption has been acquiesced in for a long period, and from other circumstances the Court may presume the existence of the requisite authority.[4] When, however, the Court is satisfied that permission to adopt exists, it will exact slight proof of the performance of ceremonies, but it cannot make a converse inference.[5] So when it was proved that an adoption had been continuously recognized for a series of years, and the party adopted had been in possession of the property in dispute, it was held that the Court might well dispense with formal proof of the performance of

[1] *Nilmadhub Dass* v. *Bishumbhur Dass*, 12 W. R., P. C., 29.

[2] *Mohindra Lall Mookerjee* v. *Rookiney Dabee*, Coryton, 42.

[3] *Chowdhry Padam Singh* v. *Koer Udaya Singh*, 12 W. R., P. C., 1; 2 B. L. R., P. C. 101; 12 Moore's I. A., 350.

[4] *Anandrav Sivaji* v. *Ganesh Eshvant Bokil*, 7 Bom. H. C. R., Ap., 33; *Tincowrie Dasi* v. *Denonath Banerjee*, W. R., Gap.. No., 155; *Greesh Chunder Lahooree* v. *Ramlall Sirkar*, 1 W. R., 145; *Mohindrolall Mookerjee* v. *Rookiney Dabee*, Coryton, 42.

[5] *Radhamadhub Gossain* v. *Radhabullub Gossain*, 1 Hay, 311; 2 Indian Jurist, O.

the ceremonies unless the contrary were distinctly proved by the party opposing the adoption.[1]

In a suit for possession of the estate left by a deceased person, the favoured title of his heir cannot be defeated and the course of inheritance changed on the ground of an adoption unless the fact of adoption be proved by evidence free from all suspicion of fraud,[2] and the *onus* is clearly on the party setting up that title against the heir to prove the adoption both as regards the power of the adopter and the fact of adoption.[3] But the burden of proving particular facts in connection with the adoption may depend upon the proof or admission of other facts, and circumstances in each case. We have already seen that undisputed possession for a long time by a person who was in fact adopted and recognised and treated as an adopted son by all the members of the family will give rise to presumptions of fact in his favour. In a case[4] of this description the Judicial Committee observed as follows:—"The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant, in order to defend his *status*, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after a long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title."

It would seem that when the requisite authority and the *factum* of adoption with the necessary formalities are proved or admitted, the burden of proving the existence of any invalidating circumstance such as the adoptee being the only son of his natural father, will lie on the party opposing the adoption.

But in a suit to have it only declared that an adoption is invalid or a false

[1] *Sabo Bewa* v. *Nuboghun Maiti*, 11 W. R., 380; 2 B. L. R., Ap., 51: *Chowdhry Heerasutoollah* v. *Brojo Soondur Roy* 18 W. R., 77.

[2] *Sutroogun Sutputty* v. *Sabitra Dye*, 5 W. R., P. C., 109.

[3] *Kripa Moyee Debia* v. *Goluck Chunder Roy*, 4 W. R., 78; *Tarinee Churn Chowdhry* v. *Sharoda Soondaree Dassee*, 11 W. R., 468.

[4] *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*, 15 W. R., P. C., 41; 7 B. L. R., 216; 14 Moore's I. A., 67.

and fraudulent adoption, it has been held that the *onus* lies on the plaintiff to prove that it is so.[1]

So also in a case[2] for a certificate under Act XXVII of 1860, it was held that an adoption *de facto* must be supposed to be a valid adoption until it is set aside, and a party so adopted is entitled to object to other parties receiving a certificate. But it should be observed that in a proceeding under the Act the right to a certificate is summarily enquired into, and a regular suit would lie for establishing title to the estate.

**Res judicata.**—Formerly it was held that the decision in a *bonâ fide* litigation in which the *status* of a person as an adopted son had been in issue and disposed of in his favour, was good *primâ facie* evidence of the adoption, in a subsequent suit even against persons who were no parties to the former litigation.[3] And in another case the Court went further, and held that unless fraud and collusion could be made out by clear and conclusive evidence, a decision of a competent Court on adoption should operate as a judgment *in rem*.[4] But these decisions have been overruled by a Full Bench[5] who, concurring, with the view expressed by the Madras High Court in a case[6] where a decree upon a question of division of joint family property was relied upon as a judgment *in rem*, held "that a decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or, more properly speaking, in an action *in personam*, is not a judgment *in rem* or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies. I would go further and say, that a decree in such a case is not, and ought not to be, admissible at all as evidence against strangers."

The same opinion has been expressed by the Privy Council in several cases relating to adoption.[7]

[1] *Brojo Krishoree Dassee* v. *Sreenath Bose*, 9 W. R., 463; *Gooroo Prosunno Singh* v. *Nil Madhub Singh*, 21 W. R., 84.

[2] *Nunkoo Singh* v. *Purm Dhun Singh*, 12 W. R., 356.

[3] *Seetaram* v. *Juggobundhoo Bose*, 2 W. R., 168; *Kistomonee* v. *Collector of Moorshedabad*, Bengal S. D. A. D., of 1859, 550.

[4] *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar*, 3 W. R., 14.

[5] *Kanhya Lall* v. *Radha Churn*, 7 W. R., 338.

[6] *Yarakalamma* v. *Anakala*, 2 Mad. H. C., 276.

[7] *Mussumauth Anundmoyee Chowdhoorayan* v. *Sheeb Chunder Roy*, 9 Moore's I. A. 87: *Jumoona Dassya* v. *Bamasoondari Dassya*, I. L. R., 1 Calc, 289; 25 W. R., 235.

LECTURE XII.

# KRITRIMA SON, ADOPTION BY NON-HINDUS, AND SPECIAL FORMS OF ADOPTION.

Kritrima son according to the Smritis and Commentaries—Dattaka and Kritrima son in Mithila—Kritrima and Kurta-putra—Capacity to adopt in Kritrima form—Capacity to give one's self in Kritrima adoption—Ceremonies for Kritrima adoption—No restrictions as to capacity of being adopted, except caste—Effects of adoption in Kritrima form—Adoption amongst Jainas—Adoption by Jaina widows without authority—No restriction as to adoptee's qualifications—Ceremonies in Jaina adoption—Adoption amongst Mahomedans—Adoption amongst Sikhs—Adoption amongst Parsis—Adoption of son-in-law, *Ghar-Jámái* and *Illatom* son-in-law—Adoption of daughters amongst Naikins or dancing girls and prostitutes.

**Kritrima son according to the Smritis and commentaries.**—The Kritrima son holds precisely the same position as the Dattaka son according to the Codes of Hindu law as well as to the commentaries on the same. In the Smritis the twelve descriptions of sons are, as we have already seen, divided into two groups, each consisting of six sons; the first group are declared heirs to kinsmen, but the second six are not so; and all the descriptions of sons become members of their legal father's *gotra* or family, and entitled to inherit from him. The two sets of six into which the twelve sons are divided by the lawgivers do not consist of the same descriptions of sons: some of those that are included by some sages under the first group are classed by others in the second. All the sages, however, agree in this, that they assign the same position to the Kritrima as they do to the Dattaka son, that is to say, if the Dattaka is included by any lawgiver in the first group, he places the Kritrima also in the same; but if the Dattaka is in any Code comprised in the second group, you will all also find the Kritrima comprehended in the same.[1]

The commentaries also that are regarded as most authoritative in other matters, do not draw any distinction between the Dattaka and the Kritrima son; but on the contrary, we find them extending to the Kritrima son all the rules propounded by them in respect of the Dattaka son.

Thus, the Mitákshará declares,—"The same (ceremonial of adoption as in the Dattaka adoption) should be extended to the case of sons bought, self-given, and *made*, (as well as that of a son deserted,) for parity of reasoning requires it."[2] And similarly the Víramitrodaya[3] says,—"The reason being equal, the prohibition in respect of an only son and the eldest son, applies to the case of the son bought, the son self-given, and the son made or Kritrima."[3]

[1] See Lecture II, *Supra* p. 59 *et. seq.* [2] Mitákshará, 1, 11, 15. [3] Page 177.

So, the Dattaka-Mímánsá discusses[1] the question whether the ritual of adoption, prescribed for an adoption in the Dattaka form is to be observed in the Kritrima and other forms of adoption, and comes to this conclusion,[2]—"Therefore, the filial relation of these five sons proceeds from adoption only, with observance of the form of either Vasishtha or Saunaka; not otherwise." So also, Nanda Pandita is of opinion that the limitation of the age for adoption applies to the Kritrima son.[3] It should be noticed that the doctrine that a son adopted after the performance upon the boy, of the ceremony of tonsure in the natural family becomes a son of two fathers,—applies to the Kritrima also.[4] It should further be observed that when Nanda Pandita maintains that the ritual of adoption applies to the five descriptions of sons, it necessarily follows that the rule of prohibited degrees for adoption, which is a part of the ritual, also applies to them.

Likewise, the Mitákshará maintains that the Kritrima as well as the Dattaka son is entitled to inherit not only from the adoptive father but also from his sapindas and samánodakas.[5] In fact both of them do, according to this treatise, hold the same position in the adopter's family.[5]

It should further be specially noticed that the Mitákshará holds that the Kritrima like the Dattaka son becomes completely severed from his natural family so as to lose his right of inheritance in the same. For, it says,[6]—"It must be so expounded; for the mention of a given son in the following passage (of Manu) is intended for any adopted or succedanous son:—'A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate: but, of him who has given away his son, the obsequies fail.'"[7]

The Viváda-Ratnákara[8] and the Viváda-Chintámani,[9] that are respected, as regards inheritance, to be of special authority in the district of Mithila where the Kritrima form of adoption prevails, also, do not draw any distinction between the Dattaka and the Kritrima son with respect to their *status*.

But, notwithstanding, the modern law of adoption in the Kritrima form is quite different from that in the Dattaka form, and appears to be based upon very recent works which have come to be regarded as authoritative on the subject; and, according to them, the modern adoption in the Kritrima form appears to be altogether inconsistent with what it is represented to be by the Codes and the earlier commentaries.

[1] Section V, 41 *et seq.*
[2] Section V, 50.
[3] Dat.-Mím. 4, 25 and 39.
[4] Dat.-Mím. 4, 32.
[5] Mitákshará, 1, 11, 30-31 and 33.
[6] Mitákshará, 1, 11, 32.
[7] Manu IX, 142.
[8] See Bengal Asiatic Society's Sanskrit Edition, pages 541 *et seq.*
[9] Pages 278-288.

**Dattaka and Kritrima son in Mithila.**—In a note appended to that Section[1] of Colebrooke's Digest, which deals with Kritrima sons, it is said,—"Sons are thus adopted in Mithila; the practice of adopting sons given by their parents was there abolished by Srídatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest, a child already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted, in the form so briefly noticed in the present section, does not lose his claim to his own family, nor assume the surname of his adoptive father: he merely performs obsequies, and takes the inheritance." Mr. Sutherland, however, was informed that the practice was not abolished by Sridatta and Pratihasta, but that a general assembly of Brahmanas was held, at which, those two celebrated Pandits presided, and it was agreed, that for future the practice of Dattaka adoption should be discontinued. And he is of opinion that an actual adoption made in the Dattaka form by a person of Mithila would not be illegal.[2]

Nor is there any case deciding that an adoption in the Dattaka form is illegal in Mithila. The description, again, of the Kritrima son's *status*, as given in the above note, is peculiar, and different from what it is according to the Smritis and commentaries, though it appears to be what is recognized by our Courts of justice.

Mr. W. Macnaghten explains the reason why the Kritrima form of adoption prevails in Mithila, thus[3]:—"But according to the doctrine of Vachaspati, whose authority is recognized in Mithila, a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *Dattaka* form; and to this prohibitory rule may be traced the origin of the practice of adopting in the Kritrima form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted, party. It is natural for every man to expect an heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithila, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting."

It should be observed, that the form of adoption, such as is prescribed by Vasishtha, Baudháyana and Saunaka, is, according to the two leading commentaries on adoption, as well applicable to the Kritrima as to the Dattaka form

[1] Colebrooke's Digest, Book V, Ch. IV, Sect. X; Vol. II, page 409 (Madras Edition.)

[2] See note XV appended to Sutherland's Synopsis.

[3] W. Macnaghten's H. L., Vol. I, 95-100.

of adoption. And the above view entertained by the learned author is based upon the opinion of Rudradhara a modern writer of a religious work entitled Suddhi-Viveka.

**Kritrima and Kurta-putra.**—The practice of adoption in the Kritrima form does not appear to be confined within the District of Mithila or Tirhoot, but seems to be prevalent also in the adjoining districts.[1] The District of Tirhoot which is a corruption of the Sanskrit name Tírabhukti, is, as the name implies, bounded on three sides by three rivers, namely, by the Gandak on the west, the Kosi on the east, and the Ganges on the south; and rivers are not such barriers as to make the usages of the people on their opposite banks to be different: so it is not likely that the practice should be confined to the people of Mithila.

I have already told you that in popular language the Sanskrit name of the *Dattaka* son is not used.[2] Similarly the word Kritrima is, seldom if ever, used by the people of Mithila, in designating that description of son; the term which is in ordinary use is *Kurta-putra*. This word, however, does not seem to be a corruption of *Kritrima-putra*, but of the word Krita-putra (कृत पुत्र) which means an adopted son as distinguished from a real legitimate son, and may mean the Dattaka as well as the Kritrima son. And it seems that sometimes the word Kurta-putra is used to designate a Dattaka son; it is, therefore, not correct to suppose that wherever the word Kurta-putra is used, it means only the Kritrima son.

**Capacity to adopt in Kritrima form.**—We have already seen that in Mithila a widow cannot adopt in the Dattaka form even when she has received her husband's express permission. But it is a peculiar doctrine of the Mithila school that a woman may adopt in the Kritrima form without her husband's permission whether he is alive or dead: and that either the husband and wife may jointly adopt one son, or they may separately adopt two sons, one for each.[3] The Pundit of the Sudr Dewany Adawlut gave the following exposition of the Mithila law on the subject[3]:—"If a man appoint another his adopted son, that person, so adopted, stands in the relation to him of a son, and offers up his funeral oblations, and is heir to his estate; but the person, so appointed, does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property. If a woman appoint an adopted son, he stands in the relation to her of a son, offers to her funeral oblations, and is heir to her estate; but he does not become the adopted son of her husband, nor offer to him funeral oblations, nor succeed to his property. If a husband

[1] See Note to *Srinath Serma* v. *Radhakaunt*, 1 Beng. Select Reports, 19 (15).

[2] See *supra*, p. 139.

[3] *Sreenarain Rai* v. *Bhya Jha*, 2 Beng. Sel. Rep., 29 (23); 1 W. Macn., 100; *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 W. R., 500; *Mussamat Shib Koeree* v. *Joogun Singh*, 8 W. R., 155.

wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If the husband appoint one person, and the wife another, adopted son, they stand in the relation of sons to each of them respectively, and do not perform the ceremony of offering funeral oblations nor succeed to the estate of the husband and wife jointly: such is the usage of Mithila."

It should be observed that an adoption in the Kritrima form, also, will not be valid if made by a person having a son in existence.

**Capacity to give one's self in adoption in Kritrima form.**—According to Hindu law a person is not independent so long as his father or mother is alive, and therefore incompetent of his own accord to renounce his filial relation to them, and to become filially related to a stranger. Hence, a man can give himself in adoption after the death of his parents. Accordingly the Mitákshará says[1]:—"The son made (Kritrima) is one adopted by the person himself, who is desirous of male issue: being enticed by the show of money and land, and being an orphan without father or mother: for, if they be living, he is subject to their control."

On this point Jagannátha observes,[2]—"In fact, the boy is bereft of father and mother, or is forsaken by them; or, both being living, they *tacitly* consent to the adoption, as a man acquiesces in another's enjoyment of his land." According to his opinion a person whose parents are alive may become the Kritrima son of another, if the parents do not raise any objection.

The consent of the person adopted is necessary for his adoption in this form; therefore he must be adult or of the age of discretion to give his assent. But as the Kritrima son does not lose his *status* in his natural family, and his adoption is in all cases beneficial to him, his consent may always be presumed even when he wants discretion.

**Formalities and ceremonies for Kritrima adoption.**—All that is necessary in this form of adoption is, that the adopter must express his desire to adopt, and the adoptee must consent to his adoption,[3] and that the consent must be given in the lifetime of the adopter.[4] The Pandits of the Sudr Court said:—"If a Mithila Brahman under any circumstances make a verbal nomination of an absent person to be his *Kritrima* son, the adoption is not valid, because the proposal "be you my son,' and the consent, 'I will become your son,' are both requisite, and in this instance cannot be found."

But no religious ceremonies or burnt-sacrifices are necessary in this form

[1] Mitákshará 1, 11, 17.

[2] Colebrooke's Digest, Book V, Ch. IV, Sect. X, Madras Edition Vol. II, 409.

[3] Colebrooke's Digest, Book V, Ch. IV, Sect. X, 2 W. Macn., 196.

[4] *Mussummaut Sutputtee* v. *Indranund Jha*, 2 Beng. Sel. Rep., 221 (173); *Luchmun Lall* v. *Mohun Lall Bhaya Gayal*, 16 W. R., 179.

of adoption. Rudradhara in his Suddhi-Viveka describes the formalities thus[1]:—"The form, to be observed, is this. At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says 'Be my son.' He replies 'I am become thy son.' The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential."

**No restrictions as to capacity of being adopted, excepting caste.**—As regards the qualifications of an adoptee in the Kritrima form, the Pundits of the Sudr Court answered the question whether a boy of ten years could be so adopted, thus[2]:—"A boy of ten years can become a *Kritrima* son, because there is no restriction of age with regard to such form of adoption in the Tirhoot authorities already mentioned; and the *Kritrima* form of adoption prevails as approved by the people of that country, without regard to the legal distinctions of the *Dattaka* form excluding an only son, an eldest son, one of more than a certain age, one initiated (in tonsure and other ceremonies,) in his own family, and therefore, incapable of being initiated by the person adopting, and one precluded by reason of his mother's affinity to that person. In conformity with the text of Manu,[3] already cited, comprehending the words 'of some kind or other' implying no distinction other than that of the person to be adopted as *Kritrima* son possessing the requisite similarity of class."

It should be observed that the adopter's consent to his adoption is necessary for affiliation in the *Kritrima* form; this involves the idea that he must be an adult; and consequently there can be no limit of age. Nor does the performance of the initiatory ceremonies in the natural family, including the *Upanayana* offer any obstacle to an adoption in this form.[4] So also marriage cannot be an obstacle in this form; for, according to the Dvaita-Nirnaya of Kesava Misra, a person may adopt even his own father.[5] But this seems to have been put forward in the heat of argument, for the idea of adoption by a man of his own father as his son, is absurd and unnatural. For, in one case it was stated by the Pundits and held by the Court that an adoption by a younger brother of an elder brother was invalid.[6] Mr. Macnaghten, however, points out that the

[1] See Mitákshará, 1, 11, 17, note; *Kullean Sing* v. *Kripa Sing*, 1 Beng. Sel. Rep., 11 (9).

[2] *Ooman Dut* v. *Kunhia Singh*, 3 Beng. Sel. Rep., 192, (145.)

[3] The passage of Manu referred to is not found in Manu, but is cited in the Dattaka-Mímánsa, as one of Manu, in sect I, para. 9; see *supra*, p. 168.

[4] 2 W. Macnaghten, 196; 2 Strange's H. L. 204.

[5] 1 W. Macnaghten, 76; *Chowdree Purmessur Dut Jha* v. *Hunooman Dut Jha*, 6 Beng. Sel. Rep., 235 (192).

[6] *Baboo Runjeet Sing* v. *Baboo Obhye Narain Sing*, 2 Beng. Sel. Rep., 315 (245).

authorities relied upon by the Pundits in support of the above view related to the *Dattaka* form of adoption.[1] But it should be observed that the form of adoption has nothing whatever to do with this question, the principle being the repugnance to feelings; no Hindu can look upon his elder brother or any other elderly relation in the light of a son.

It has already been noticed that relationship is not considered as a bar to this species of adoption, and therefore a daughter's and sister's son may be adopted.[2]

As a *Kritrima* son does not lose his *status* in his natural family, and is always considered as a Dvyámushyáyana, the prohibition against adopting an only son or an eldest son cannot apply to this form of adoption.

**Effects of adoption in Kritrima form.**—From the passages already cited, it is clear that the *Kritrima* son does not lose his *status* in his natural family; he retains all his rights in the family of his birth, and in addition acquires the right of inheriting from the adopter alone. We have already seen that, according to some lawgivers and commentators, the *Dattaka* and *Kritrima* son are entitled to inherit from the adoptive father alone, and cannot claim to inherit from any of his lineal or collateral relations. That view of the law has been accepted with respect to the *Kritrima* son's right of inheritance in the adoptive family. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband.[3]

Similarly it has been held that a *Kritrima* son's son cannot take any interest in the self-acquired property of his grandfather by adoption, so as to set aside an alienation made by him of such property.[4] But it would seem the law would be different if the property were ancestral.

In all these cases the reason assigned is, that the relationship created by adoption in the *Kritrima* form is limited to the contracting parties only, and does not extend beyond them on either side.

But so far as the lineal ancestors of the adoptive father are concerned, the above reason is applicable to inheritance only. For, as regards the performance of the Sráddha ceremonies for which a son is adopted, the relationship must extend to the adopter's ancestors to whom *pindas* are to be offered when the same are presented to the adopter.

It should further be observed that the doctrine that the *Kritrima* son be-

[1] 1 W. Macnaghten, 76, note.

[2] *Chowdree Purmessur Dut Jha* v. *Hunooman Dut Jha*, 6 Beng. Sel Rep., 235 (192).

[3] *Srinath Serma* v. *Radhakaunt*, 1 Beng. Sel. Rep., 19 (15), note; *Sreenarain Rai* v *Bhya Jha*, 2 Beng. Sel. Rep., 29 (23); *Mussumaut Deepoo* v. *Gowree Shunker*, 3 Beng. Sel. Rep., 410 (307); *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 W. R., 500; *Mussumaut Shib Koeree* v. *Joogun Singh*, 8 W. R., 155.

[4] *Baboo Juswant Singh* v. *Doolee Chand*, 25 W. R., 255.

comes the son of two fathers, and as such, retains his connection with his natural family, has no foundation on any passage of the Codes; and it probably owes its origin to the view that an adoption made after a certain age, and after certain initiatory ceremonies have been performed in the natural family, is attended with that result. But in other respects the above law of *Kritrima* adoption is founded on the Smritis, and has not been complicated with the absurd rules and restrictions such as have been imposed upon the *Dattaka* adoption by modern writers.

**Adoption amongst Jainas.**—The Jainas appear to be a sect of the Buddhists, but not so antagonistic to Bráhmanism as the latter were; and Jainism "may not unfairly be described as a compromise between Hinduism and Buddhism." The Jainas, like the Buddhists, do not admit the authority of the Hindu Shasters; but the former admit the caste-system, and the superiority of the Bráhmanas who are the priests in their temple. And although Jainism differs in many respects from Hinduism, yet on the whole, the Jainas may be called Hindu dissenters. The doctrine of *Ahinsá*, or tenderness for all sentient beings, which makes it a sin to destroy animal life, is common to the three systems, namely, Hinduism, Buddhism and Jainism. But the Jainas are distinguished for the scrupulous observance of that grand virtue in practice, by avoiding all sorts of animal food. For religious purposes, the Jainas are divided into two classes, namely, the *Yatis* or Jaina ascetics devoted to religion, and the *Srávakas* or secular Jainas or the laity; the word "Saraogi" which you will find in several cases is a corruption of the latter term. The Yatis again are divided into *Digambaras* who are followers of Mahávíra and go naked, and *Svetámbaras* who are disciples of Párswanáth and are dressed in garments. The Srávaka or the laity includes persons of various tribes: but, on this side of India, the secular Jainas are mostly of the Vaisya class which subdivides itself into numerous septs, the most common of which are,—Oswáls, Agarwals, Parwars, and Khandewáls.[1]

Some of the Jainas have adopted Vaishnavism, but they do not on account of this change of religious faith, lose their position in the Jaina community;[2] and it would seem that with respect to inheritance and adoption, they continue to be governed by the usages and customs of their Jaina ancestors.[3]

The Jainas possessing a voluminous religious literature of their own, are not likely to have no work on law. But the orthodox Hindu Pundits who were the law officers of our Courts were in general quite ignorant of the law books of the Jainas whom they regarded with much contempt,[3] and who have, therefore

[1] See Colebrooke's Observations on the Sect of Jains, Asiatic Researches, Vol. IX, p. 97, (Colebrooke's Miscellaneous Essays, Vol. II, p. 191, Madras Edition); Dr. Wilson's Works, Vol. I, p. 276; Hunter's Statistical Accounts of Bengal, Vol. XVI, 207.

[2] *Manick Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*, I. L. R., 17 Calc., 518.

[3] *Maha Rajah Govindnath Roy* v. *Gulal Chand*, 5 Beng. Sel. Rep., 322 (276).

fore been, as a general rule, subjected to the ordinary Hindu law except when any special law, custom or usage varying the Hindu law has been proved to obtain amongst them on particular points.[1]

The religion of the Jainas appears to have originated and flourished in the North-Western Provinces, and its followers were originally people domiciled in those places. It does not seem to have succeeded in making any proselytes in Bengal; and its followers that are found here have all emigrated from the North-West for the purposes of trade, and have become settled in their respective places of business. Their number is the largest in the district of Murshidabad the Mahomedan Capital of Bengal, where they were the principal bankers and merchants.

The Jainas of Bengal, therefore, are governed by the Mitákshará law of the country of their origin, and not by the Dáyabhaga School prevailing here.

The usage of adoption obtains amongst the Jainas, although they do not perform the Sráddhas, or believe in the Hindu doctrine of spiritual efficacy of sons: adoptions amongst them want the spiritual element, and are entirely secular in character. Their usages and customs relating to adoption show that in this respect they are governed by the ancient Hindu law and not by the innovations introduced by the Dattaka-Mímánsá and similar modern treatises. But the doctrine inculcated by them, that the Dattaka is the only description of secondary son in the present age, has been applied to the Jainas; although the Jaina Shasters appear to recognize the *Kritrima* son and the *Putriká-putra* in addition to the Dattaka. The last, however, appears to be the prevailing form of adoption, and the former two are so rare that they have come to be regarded as no longer recognised by the Jaina community.[2] They are governed by the Hindu law of adoption, except in the following particulars in which it has been proved that their usages are different.

**Adoption by Jaina widows without authority.**—A Jaina widow is competent to adopt a son, even when her husband died without giving any authority in that behalf, and this custom has been held to obtain amongst the Oswáls[3] as well as the Agarwals.[4] She may adopt a second son if the first adopted son dies, leaving the adoptive mother as heir.[5] I have already told you that the power of widows to adopt without permission of their husbands or consent of their kinsmen, depends on the nature of the estate taken by them in the property inherited by them from their husbands. When a Jaina dies without leaving

[1] *Chotay Lall* v. *Chunnoo Lall*, I. L. R., 4 Calc., 744; L. R., 6 I. A., 15.

[2] *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[3] *Maha Rajah Govindnath Roy* v. *Gulal Chand*, 5 Beng. Sel. Rep., 322 (276); *Manik Chand Golacha* v. *Jagat Settani Pran Kumari Bibi*, I. L. R., 17 Calc., 518.

[4] *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[5] *Sheo Singh Rai* v. *Dakho*, I. L. R., 1 All., 688.

any male issue, his widow takes an absolute interest in his self-acquired property;[1] and her competency to adopt, agreeably to her own choice, seems to be an incident of that doctrine.

**No restrictions as to adoptee's qualifications.**—An adoption among the Jainas being a temporal institution, the religious ground of objection against the adoption of an only son must necessarily fail;[2] such adoption would therefore be valid unless the extinction of the natural father's lineage in a temporal point of view be admitted to vitiate it.

The rule of prohibited relations for adoption does not obtain amongst the Jainas, who may, therefore, adopt a daughter's or sister's son.[3]

Nor is the restriction based upon the age of the adoptee, is applicable to the Jainas, among whom the rule is that a person within the age of thirty-two may be adopted.[4]

**Ceremonies in Jaina adoption.**—Nor are any religious ceremonies necessary for a valid adoption amongst the Jainas[5] who do not believe in the efficacy of rites prescribed by the Hindu shasters. The gift and acceptance of the person adopted are the only requisite ceremonies for a lawful adoption amongst them.

The act of adoption is called "*Godh-lena*" or "taking on lap," by the Jainas, the Punjabis and others. The practice amongst the Jainas is to invite the kinsmen and the principal men of their caste in whose presence the son is adopted; a deed of adoption is executed, and after the gift and acceptance, the boy is dressed and is made to sit on the lap of the adoptive father, or of a relation when the widow adopts, in the assembly of the relations and the caste-people, and the ceremony is finished by the distribution of betels, cocoanuts, &c. to the persons assembled. Although religious rites are not necessary, yet a part of the ceremony of adoption is to repair to a Jaina temple for the purpose of performing the benedictory rite before the image of Jina or the Conqueror of the human infirmities, which is the title of the founder of the religion of the Jainas.[6]

**Adoption amongst Mahomedans.**—The Mahomedan law does not recognise the adoption of a son; though the Shia doctrine of *Willa* or the relation between two persons who make a reciprocal contract of inheritance, each to be the heir of the other, and by virtue of which the survivor can inherit in default

[1] *Lakmi Chand* v. *Gatto Bai*, I. L. R., 3 All., 319.

[2] *Manik Chand Golecha*, v. *Jagat Settani Pran Kumari Bibi*, I. L. R., 17 Calc., 518.

[3] *Sheo Singh Rai* v. *Dakho*, I. L. R., 1 All., 688; 2 C. L. R., 193; L. R., 5 I. A., 87, affirming 6 N. W. P. Rep., 382; *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[4] *Maha Rajah Govindnath Roy* v. *Gulal Chand*, 5 Sel. Rep., 322 (276).

[5] *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 319.

[6] See Arhan-Niti and Jaina-Sanhita, Sanskrit works of the Jainas.

of all heirs by consanguinity and marriage, bears a distant analogy to adoption.[1]

But the Mahomedans in India, especially the lower classes of them, who appear to be of Hindu descent, having been associated during many centuries with the Hindus who form the majority of the people, are found to follow the Hindu usages in several particulars. There are many Mahomedan villagers who live in small numbers amidst Hindus and having no knowledge of the Mahomedan law believe that they are governed by the same law by which their Hindu co-villagers are governed. The members of Mahomedan families are often found to live jointly like the Hindus; in such cases it seems reasonable and equitable that the Hindu law of coparcenary should be applied,[2] though it is undoubtedly true that in *Mahomedan law* there is no presumption that the acquisitions made by the several members of a Mahomedan family living in commensality are made for the benefit of the family.[3]

The contact between the Hindus and the Mahomedans appears to be most intimate as it is the earliest in the Punjab. It has been most fortunate for the people of the Punjab, whether Hindus, Mahomedans or Sikhs, that their customs have been recorded under the authority of the Government. And it has been found that the Mahomedans there have adopted the Hindu usages in several important matters, that are not recognised by, and are opposed to, the Mahomedan law. For instance, the custom for a childless village landholder to take a relation into his house in infancy and bring him up as his son, to render him his heir and successor, as if adopted in the manner known among Hindus, is a general village custom with both *Mahomedans* and Hindus.[4] The incidents of such adoptions amongst the Mahomedans of the Punjab are governed by the customary law of the locality.

In Bengal there are two reported cases of adoption by Mahomedans, in the first of which there is a *dictum* of the Sudr Court that the adopted son was entitled to a certificate under Act XXVII of 1860;[5] but in the later case the High Court held that as an adopted son could not inherit according to Mahomedan law, he was not entitled to have a certificate to collect debts due to the estate of his alleged deceased adoptive father.[6]

**Adoption amongst Sikhs.**—The Sikhs are followers of a religion which originated with Nának Sháh, but was materially modified by Govinda Sinha

[1] Macnaghten's Mahomedan Law, 34 and 39.

[2] *Rup Chand Chowdhry* v. *Latu Chowdhry*, 8 C. L. R., 97.

[3] *Hakim Khan* v. *Gool Khan*, I. L. R., 8 Calc., 826.

[4] *Hassan* v. *Samma*, Punjab Records, 1874, Case No. 54 page 194; *Najib Khan* v. *Husain Khan*, Punjab Records, 1880, Case No. 43.

[5] *Mirza Aga Ali Hossein Khan* v. *Shoohamut Ali*, S. D. A.-D. of 1861, see 9 W. R., 502.

[6] *Khajah Oheed Khan* v. *Collector of Shahabad*, 9 W. R., 502.

their *Das Pádsháh* or tenth Guru well known as Guru Govind who introduced the warlike spirit, abolished caste, threw open his faith to all Hindus and to Mahomedans, and formed the Sikhs into a martial people. Notwithstanding their rejection of caste, and of the authority of *Vedas* and Puránas, for which the compilation of Guru Govind, called the *Das Pádsháh ká granth* is substituted, they are still to a certain extent, Hindus: they worship the Hindu deities, celebrate the Hindu festivals, derive their legends and literature from the Hindu source, and pay great veneration to the Bráhmanas. Like the Jainas, the Sikhs are Hindu dissenters, and having no civil law of their own, are governed by the Hindu law.[1]

In matters of adoption they are, like the Jainas, governed by the ancient Hindu law, and the modern innovations introduced by Nanda Pandita are not respected in the Punjab. The results of the enquiry into the Punjab customs on Adoption, arrived at by Messrs. Boulnois and Rattigan have been summarized by Mr. Tupper[2] as follows:—

I. No ceremony is needed. Adoptions do not subsist on any sacerdotal ground.

II. There are no restrictions with regard to the age of the person adopted.

III. The adoption of a daughter's son must, in the Punjab, be presumed to be valid.

IV. If the natural father die without heirs, it is believed that village custom would be in favour of the double succession of the adopted or quasi-adopted son.

V. The power of a widow to adopt depends on whether her husband gave her permission in his lifetime. Failing this, the consent of his kindred, which might be presumed from long acquiescence, might supply the want.

The only point in which there is difference between the Jaina and the Punjab customs, is that, unlike the Jaina widow, the widow of a Punjabi cannot adopt a son in the absence of the requisite authority. It should further be observed that the above rules apply also to the Hindus of the Punjab.

**Adoption amongst Parsis.**—Adoption is also recognised by the Parsi community. There are two forms of adoption amongst them, namely, the Paluk-putra, and the Dhurm-putra; the former, also called Paluk-beta, is adopted son generally for all purposes and is entitled to inherit, while the latter is but a partial adoption not investing the adopted son with all the rights of a son.[3]

**Adoption of son-in-law, Ghar-Jámái and Illatom son-in-law.**— usage of adopting a son-in-law appears to owe its origin to the

[1] See *Doe dem Kishenchunder Shaw* v. *Baidam Beebee*, 2 Morley's Digest, 22.

[2] See Tupper's Punjab Customs, Vol. III, 78.

[3] *Homabaee* v. *Punjeabhaee Dosabhaee*, 5 W. R., P. C., 102: see Morely's Digest, Ad 115—118

principle upon which the ancient institution of appointing a daughter to raise male issue for her father was founded, and to be but a different form which the same institution has assumed in course of time. We have already considered the usage of the Putrika-putra. The joint family is the cherished institution of the Hindus; it is therefore most natural for a Hindu who has a daughter, but who is destitute of male issue and has no near male relation living with him, to give his daughter in marriage to a person who would consent to live with him as a member of his family. This usage of a Ghar-Jámái or son-in-law residing with his father-in-law as a member of his family appears to obtain in all parts of India, and the ancient institution of the Putrika-putra or appointment of a daughter to raise issue to her father seems to have been an arrangement of the same description. It is, however, quite clear that none but a poor man would agree to a stipulation of that kind and leave his ancestral house and accept the inferior position of a dependent member of his wife's father's family.

But it would seem that even a poor man would not accept that position, unless he were entitled to some interest in his father-in-law's property. According to ancient law the appointed daughter was entitled to the same interest as a son, and shared her father's property equally with a son born to her father;[1] and if the appointed daughter died without a son her husband was entitled to her property.[2] Thus a sufficient provision appears to have been made for the son-in-law agreeing to marry an appointed daughter.

In most parts of India, including Bengal, the sons-in-law in the above predicament are not recognised to possess any interest, present or contingent, in their father-in-law's property. But the usage in some localities and amongst some castes, confers substantial rights on them, similar to those of an adopted son.

Thus, amongst the Awans in the district of Sialkot in the Punjab, the custom is that if the Ghar-Jámái has given up all claims to his father's property, he will retain his claim to his father-in-law's property, even if his wife die, and he marry another.[3]

In Madras the custom of *Illatom* or affiliation of son-in-law obtains amongst the *Reddi* caste in the districts of Bellary and Kurnool. A person who has no son, although he may have more than one daughter, may exercise the right of taking an *Illatom* son-in-law, whether or not he is at the time hopeless of having male issue.[4]

This form of adoption confers higher rights than an ordinary adoption; for, the *Illatom* son-in-law, does, for the purposes of succession, stand precisely

[1] Manu IX, 134.
[2] Manu IX, 135.
[3] Tupper's Punjab Customs, Vol. III, 84.
[4] *Hanumantamma* v. *Rami Reddi*, I. L. R., 4 Mad., 272.

in the place of a begotten son, and in competition with natural-born sons take an equal share.[1] There are many questions in connection with this species of affiliation which is not clear, and the above doctrine is not recognised for all purposes. For, a man is competent to adopt a son after having affiliated an *Illatom* son-in-law; and although the *Illatom* son-in-law, and the adopted son may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu coparceners having the right of survivorship.[2]

The circumstance of being taken as *Illatom* constitutes a mode whereby the person taken, acquires the property of his father-in-law, but the tie of relationship between the *Illatom* son-in-law and his natural family is not severed, as it is when there is an ordinary adoption under Hindu law; consequently their mutual right of inheritance subsists.[3]

**Adoption of daughters amongst Naikins or dancing girls and prostitutes.**—We have already seen that Nanda Pandita recommends the adoption of daughters to persons destitute of female children for the purpose of securing the spiritual benefit conferred by the daughter's son. But it is so costly a spiritual luxury that his recommendation has not been favourably received by the Hindu community. The practice of adopting daughters, however, is common amongst the abandoned class of women who are actuated by secular, and not by spiritual, motives in having recourse to that species of affiliation.

The Hindu law recognises the prostitutes as a distinct caste, and lays down rules for regulating the relation between them and their paramour.[4] This wretched class seems to have been originally composed of the unfortunate women outcasted by Hindu society on account of their unchastity under such circumstances that it could not be expiated by penance or redeemed by atonement. The fear of social persecution that awaits indiscreet women of respectable families, deviating from the path of virtue, does often compel them to leave the Hindu society which sets a very high value on the chastity of females, and to join the community of the unfortunate women. According to the Mitákshará, however, this class forms the fifth caste and is without a beginning, like the four principal castes.[5] But whatever might be the origin of this class, the fact cannot be ignored that it is partly composed of women not born of prostitutes. The position of the unfortunate women of families, joining this class is most miserable; they are for ever cut off and severed from their family in the same way as if they were dead, and are never recognised by their relations,

[1] *Hanumantamma* v. *Rami Reddi*, I. L. R., 4 Mad., 272.

[2] *Chenchamma* v. *Subbaya*, I. L. R., 9 Mad., 114.

[3] *Ramakristna* v. *Subbakka*, I. L. R., 12 Mad., 442.

[4] Viváda-Chintamani, 101; Sanskrit Mitákshará on Yájnavalkya, II, 292.

[5] See Sanskrit Mitákshará on Yájnavalkya, II, 290.

xce pt after their death in rare instances which are now-a-days found when their estate is claimed by some shameless original relation of theirs.[1]

The adoption of daughters appears to be a general custom amongst the dancing-girls and prostitutes who have no daughters born of their body. The miserable condition of their life compels them to have recourse to this practice for their support in old age. It is a notorious fact that in Calcutta the prostitutes take daughters from beggar women, and bring them up as their own. The custom of adopting daughters is prevalent and recognized amongst the Naikins or dancing-girl caste in Southern India.

In Calcutta[2] and Bombay[3] such adoptions have been held illegal. The Bombay High Court have discussed the question in an elaborate judgment, and come to the conclusion that adoption by Naikins cannot be recognised by Courts of Law, and confers no right on the person adopted; the usage being opposed to morality and "the laws of God" cannot have the force of law.[3] Another reason assigned by that Court is, that a woman, according to Hindu law, can adopt only to her husband, but as a prostitute has no husband, she cannot adopt at all.

But dissenting from the above view the Madras High Court have held that such adoption can be recognised by the Civil Courts and does confer rights on the girl adopted.[4] The reason assigned is, that as a matter of private law, the class of dancing-women being recognised by Hindu law as a separate class having a legal *status* the usage of that class, in the absence of positive legislation to the contrary, regulates rights of *status* and of inheritance, adoption and survivorship.[5] Accordingly it has been held that the custom of the dancing-girls permits plurality of adoptions; and that when one of two adopted daughters died leaving a son, and subsequently the adoptive mother died, the surviving adopted daughter was entitled to the adoptive mother's property in preference to the son of the other daughter.[5] It has also been held that when a married woman deserted her husband and lived in adultery with another man to whom, she bore two daughters and two sons, and the two daughters associated together leading the life of prostitution, while the two sons separated themselves from their sisters and observed caste usage, and the elder daughter died leaving property in land,—the surviving sister succeeded to the deceased in preference to the brother.[6] The general rule is, that the legal relation between a prostitute dancing-girl and her undegraded relations remaining in caste becomes completely severed.[1]

[1] *Narasanna* v. *Gangu*, I. L. R., 13 Mad., 133.
[2] *Hencower* v. *Hanscower*, 2 Morley's Digest, 133.
[3] *Mathura Naikin* v. *Esu Naikin*, I. L. R., 4 Bom., 545.
[4] *Venku* v. *Mahalinga*, I. L. R., 11 Mad., 393.
[5] *Muttukannu* v. *Paramasami*, I. L. R., 12 Mad., 214.
[6] *Sivasangu* v. *Minal*, I. L. R., 12 Mad., 277.

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